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THE CONSTITUTION

OF THE

UNITED STATES OF AMERICA

ANALYSIS AND INTERPRETATION

1988 SUPPLEMENT

ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JUNE 29, 1988

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AMENDMENTS PENDING BEFORE THE STATES

Proposed Amendment XXVII

[P. 47]

The proposed amendment relating to representation in Congress for the District of Columbia failed of ratification, 16 States having ratified as of the 1985 expiration date for the ratification period. In addition to the 10 States previously listed, they were: Maine, February 16, 1983; West Virginia, February 23, 1983; Rhode Island, May 14, 1983; Iowa, January 19, 1984; Louisiana, June 24, 1984; and Delaware, June 28, 1984.

ARTICLE I

[P. 69, add new section preceding "Delegation":]

LEGISLATIVE POWER: SEPARATION OF POWERS LIMITATIONS

Following a lengthy period of relative inattention to separation of powers issues,[1] the Court has recurred to the doctrine in numerous cases, and the result has been a substantial curtailing of congressional discretion to structure the National Government. Thus, the Court has interposed constitutional barriers to a congressional scheme to provide for a relatively automatic deficit-reduction process because of the critical involvement of an officer with significant legislative ties,[2] to the practice set out in more than 200 congressional enactments establishing a veto of executive actions,[3] and to the vesting of broad judicial powers to handle bankruptcy cases in officers not possessing security of tenure and salary.[4] Contrarily, the highly-debated establishment by Congress of a process by which independent special prosecutors could be established to investigate and prosecute cases of alleged corruption in the Executive Branch was sustained by the Court in a opinion that may presage a judicial approach in separation of powers cases more accepting of some blending of functions at the federal level.[5]

Important as were the results in the series of cases that began with *Buckley* v. *Valeo*,[6] the development in the cases of two separate and inconsistent doctrinal approaches to separation of powers issues occasioned the greatest amount of commentary. The existence of the two approaches, that could apparently be employed in the discretion of the Justices, made difficult the prediction of the outcomes of differences over proposals and alternatives in governmental policy. Significantly, however, it appeared that the Court most often used a more strict analysis in cases in which infringements of executive powers were alleged and a less strict analysis

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[1] Principally, separation of powers language appeared in cases questioning delegations of legislative powers, but however strong the language the Court invariably, with two now-problematic exceptions, sustained the delegations. The two most important cases not concerning delegations prior to the current period of interest were *Myers* v. *United States*, 272 U.S. 52 (1926), and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935).

[2] *Bowsher* v. *Synar*, 478 U.S. 714 (1986).

[3] *Immigration and Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983).

[4] *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

[5] *Morrison* v. *Olson*, 486 U.S. —, 108 S. Ct. 2597 (1988).

[6] 424 U.S. 1, 109–143 (1976).

when the powers of the other two Branches were concerned. The special prosecutor decision may signal the adoption of a single analysis, the less strict analysis, for all separation of power cases or it may turn out to be but an exception to the Court's dual doctrinal approach.

While the two doctrines have been variously characterized, the names generally attached to them have been "formalist," applied to the more strict line, and "functional," applied to the less strict. The formalist approach emphasizes the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating.[7] The functional approach emphasizes the core functions of each branch and asks whether the challenged action threatens the essential attributes of the legislative, executive, or judicial function or functions. Under this approach, there is considerable flexibility in the moving branch, usually Congress acting to make structural or institutional change, if there is little significant risk of impairment of a core function or in the case of such a risk if there is a compelling reason for the action.[8]

Chadha used the formalist approach to invalidate the legislative veto device by which Congress could set aside a determination by the Attorney General, pursuant to a delegation from Congress, to suspend deportation of an alien. Central to the decision were two conceptual premises. First, the action Congress had taken was legislative, because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside the Legislative Branch, and thus Congress had to comply with the bicameralism and presentment requirements of the Constitution.[9] Second, the Attorney General was performing an executive function in implementing the delegation from Congress and the legislative veto was an impermissible interference in the execution of the laws. Con-

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[7] "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable." *Chadha*, 462 U.S. at 951. See id., 944–51; *Northern Pipe Line*, 458 U.S. at 64–66 (plurality opinion); *Bowsher*, 478 U.S. at 721–27.

[8] *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850–51, 856–57 (1986); *Thomas* v. *Union Carbide Agric. Products Co.*, 473 U.S. 568, 587, 589–93 (1985). The Court had first formulated this analysis in cases challenged as infringing on presidential powers, *United States* v. *Nixon*, 418 U.S. 683, 713 (1974); *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442–43 (1977), but it had subsequently turned to the more strict test. *Schor* and *Thomas* both involved provisions challenged as infringing judicial powers.

[9] 462 U.S. at 952.

gress could act only by legislating, by changing the terms of its delegation.[10] In *Bowsher* the Court held that Congress could not vest even part of the execution of the laws in an officer, the Comptroller General, who was subject to removal by Congress because this would enable Congress to play a role in the execution of the laws. Congress could act only by passing other laws.[11]

On the same day *Bowsher* was decided through a formalist analysis, the Court utilized the less strict, functional approach in resolving a challenge to the power of a regulatory agency to adjudicate as part of a larger canvas a state common-law issue, the very kind of issue that *Northern Pipe Line*, in a formalist plurality opinion with a more limited concurrence, had denied to a non-Article III bankruptcy court.[12] Sustaining the agency's power, the Court emphasized "the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.' "[13] It held that in evaluating such a separation of powers challenge, the Court had to consider the extent to which the "essential attributes of judicial power" were reserved to Article III courts and conversely the extent to which the non-Article III entity exercised the jurisdiction and powers normally vested only in Article III courts, the origin and importance of the rights to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III.[14] *Bowsher*, the Court said, was not contrary, because "[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."[15] The test was a balancing one, whether Congress had impermissibly undermined the role of another branch without appreciable expansion of its own power.

While the Court, in applying one or the other analysis in separation of powers cases, had never indicated its standards for choosing one analysis over the other, beyond inferences that the formalist approach was proper when the Constitution fairly clearly committed a function or duty to a particular branch and the functional approach was proper when the constitutional text was indetermi-

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[10] *Id.* at 954–55.

[11] 478 U.S. at 726–27, 733–34.

[12] While the agency in *Schor* was an independent regulatory commission and the bankruptcy court in *Northern Pipe Line* was either and Article I court or an adjunct to an Article III court, the characterization of the entity is irrelevant and in fact the Court made nothing of the difference. The issue in either case was whether the judicial power of the United States could be conferred on an entity not an Article III court.

[13] *Schor*, 478 U.S. at 848 (quoting *Thomas*, 473 U.S. at 587).

[14] *Id.* at 851.

[15] *Id.* at 856.

nate and a determination must be made on the basis of the likelihood of impairment of the essential powers of a branch, the overall results had been a strenuous protection of executive powers and a concomitant relaxed view of the possible incursions into the powers of the other branches. It was thus a surprise, then, when in the independent counsel case, the Court, again without stating why it chose that analysis, utilized the functional standard to sustain the creation of the special prosecutor.[16] The independent counsel statute, the Court emphasized, was not an attempt by Congress to increase its own power at the expense of the executive nor did it constitute a judicial usurpation of executive power. Moreover, the Court stated, the law did not "impermissibly undermine" the powers of the Executive Branch nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." [17] Acknowledging that the statute undeniably reduced executive control over what it had previously identified as a core executive function, the execution of the laws through criminal prosecution, through its appointment provisions and its assurance of independence by limitation of removal to a "good cause" standard, the Court nonetheless noticed the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to to ensure that the laws are faithfully executed by the counsel. This balancing, the Court thought, left the President with sufficient control to ensure that he is able to perform his constitutionally assigned functions.

Although it is possible that *Morrison* represents a decision by the Court to adopt for all separation of powers cases the functional analysis, the history of adjudication since 1976, plus the change of approach between *Myers* and *Humphrey's Executor*, suggests caution and the necessity to observe closely the approach of the Justices in the cases now on the horizon.

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[16] To be sure, the appointments clause did specifically provide that Congress could vest in the courts the power to appoint inferior officers, *Morrison* v. *Olson*, supra, 108 S. Ct. at 2608–11, making possible the contention that, unlike *Chadha* and *Bowsher*, *Morrison* is a textual commitment case. But the Court's separate evaluation of the separation of powers issue does not appear to turn on that distinction. Id. at 2616–22. Nevertheless, the existence of this possible distinction should make one wary about reading *Morrison* as a rejection of formalism when executive powers are litigated.

[17] *Id.* at 2621 (quoting, respectively, *Schor*, 478 U.S. at 856, and *Nixon* v. *Administrator of General Services*, 433 U.S. at 443).

CONGRESSIONAL DISTRICTING

[P. 105, add new note to end of section's penultimate sentence:

> Reaffirming that there is no *de minimis* population variance, the Court in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), ruled that population variations were not *per se* valid simply because they were smaller than the estimated census undercount for a district. Moreover, the Court saw no reason to abandon strict mathematical equality as the guide for congressional districting; given rapid advances in computer technology it is now "relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has." *Id.*, at 733.

THE LEGISLATIVE PROCESS

The Veto Power

[P. 136, add to end of first full paragraph on page:]

> Another appeals court panel applied this same reasoning in holding that intersession adjournment does not prevent return of a bill,[18] but the Supreme Court did not rule on the merits, the case having been mooted by the bill's expiration by its own terms before the Court's decision.[19]

Presentation of Resolutions

[P. 139, at end of Section, add:]

> In *Immigration and Naturalization Service* v. *Chadha*,[20] the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Art. I, §§ 1 and 7, and in the presentment provisions of Art. I, § 7, cl. 2 and 3. The provision in question was section 244(c)(2) of the Immigration and Nationality Act, which authorized either House of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country. The Court's analysis of the presentment issue makes clear, however, that two-House veto provisions and committee veto provisions suffer the same constitutional infirmity.[21] In the words of dissenting Justice White, the Court in *Chadha* "sound[ed] the death knell for nearly

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[18] *Barnes* v. *Kline*, 759 F.2d 51 (D.C. Cir. 1985).

[19] *Burke* v. *Barnes*, 479 U.S. 361 (1987).

[20] 462 U.S. 919 (1983).

[21] Shortly after deciding *Chadha*, the Court removed any doubts on this score with summary affirmance of an appeals court's invalidation of a two-House veto in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C.Cir. 1982), aff'd *sub nom. Process Gas Consumers Group* v. *Consumer Energy Council*, 463 U.S. 1216 (1983).

200 other statutory provisions in which Congress has reserved a 'legislative veto.' " [22]

In determining that veto of the Attorney General's decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the general standard. "Whether actions taken by either House are, in law and in fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.' [T]he action taken here . . . was essentially legislative," the Court concluded, because "it had the purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the legislative branch." [23]

The other major component of the Court's reasoning in *Chadha* stemmed from its reading of the Constitution as making only "explicit and unambiguous" exceptions to the bicameralism and presentment requirements. Thus the House alone was given power of impeachment, and the Senate alone was given power to convict upon impeachment, to advise and consent to executive appointments, and to advise and consent to treaties; similarly, the Congress may propose a constitutional amendment without the President's approval, and each House is given autonomy over certain "internal matters," e.g., judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these "narrow, explicit, and separately justified" exceptions must conform to the prescribed procedures: "passage by a majority of both Houses and presentment to the President." [24]

The breadth of the Court's ruling in *Chadha* was evidenced in its 1986 decision in *Bowsher* v. *Synar*.[25] Among the rationales for holding the Deficit Control Act unconstitutional was the Court's assertion that Congress had, in effect, retained control over executive action in a manner resembling a congressional veto. "[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execu-

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[22] 462 U.S. at 967. Chief Justice Burger wrote the opinion of the Court in *Chadha*, joined by Justices Brennan, Marshall, Blackmun, Stevens, and O'Connor. Justice Powell concurred separately, asserting that Congress had violated separation of powers principles by assuming a judicial function in determining that a particular individual should be deported. Justice Powell therefore found it unnecessary to express his view on "the broader question of whether legislative vetoes are invalid under the Presentment Clauses." Justices White and Rehnquist dissented.

[23] 462 U.S. at 952 (citation omitted).

[24] 462 U.S. at 955–56.

[25] 478 U.S. —, 92 L.Ed.2d 583 (1986).

tion of its enactment only indirectly—by passing new legislation." [26] Congress had offended this principle by retaining removal authority over the Comptroller General, charged with executing important aspects of the Budget Act.

The Immigration and Nationality Act contained a severability clause, and the Court found nothing to overcome the presumption of severability arising therefrom.[27] In a later case the Court held that, in the absence of a severability clause, the test is whether the statute will function without its legislative veto provision "in a manner consistent with the intent of Congress." [28] To answer this question, "the nature of the delegated authority that Congress made subject to a veto" must be considered along with other indications of intent." [29]

POWER TO TAX AND SPEND

Kinds of Taxes Permitted

— Decline of the Forbidden Subject Matter Test

[P. 140, add to N.8:]

Pollock was expressly overruled in *South Carolina* v. *Baker*, 485 U.S. —, 99 L.Ed.2d 592 (1988).

— Federal Taxation of State Interests

[P. 142, add new paragraph to end of section:]

In finally overruling *Pollock*, the Court indicated that *Pollock* had "merely represented one application of the more general rule that neither the federal not the state governments could tax income an individual directly derived from any contract with another government." [30] That rule, the Court indicated, had already been rejected in numerous decisions involving intergovernmental immunity. "We see no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government, and no tenable rationale for distinguishing the costs imposed

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[26] 92 L.Ed.2d at 601. This position was developed at greater length in the concurring opinion of Justice Stevens, *id.* at 603.

[27] *See* 462 U.S. at 931-35.

[28] *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. —, 94 L.Ed.2d 661, 670 (1987).

[29] *Id.* (noting that the regulations subject to veto were relatively unimportant to the effectiveness of the statute, and that presence of a "report and wait" provision allowed Congress time to react with legislation if desired).

[30] *South Carolina* v. *Baker*, 485 U.S. —, 99 L.Ed.2d 592, 605 (1988).

on States by a tax on state bond interest from the costs imposed by a tax on the income from any other state contract." [31]

— Scope of State Immunity from Federal Taxation

[P. 143, add new paragraph at end of section:]

The Court articulated the current approach in *South Carolina* v. *Baker*.[32] The rules are "essentially the same" for federal immunity from state taxation and for state immunity from federal taxation, except that some state activities may be subject to direct federal taxation, while states may "never" tax the United States directly. Either government may tax private parties with whom it does business, "even though the financial burden falls on the [other government], as long as the tax does not discriminate against the [other government] or those with whom it deals." [33] Thus, "the issue whether a nondiscriminatory federal tax might nonetheless violate state tax immunity does not even arise unless the Federal Government seeks to collect the tax directly from a State." [34]

— Uniformity Requirement

[P. 144, in text following N.7, add:]

Even the geographical limitation is a loose one. In *United States* v. *Ptasynski* [35] the Court upheld an exemption from the crude oil windfall profit tax of "Alaskan oil," defined geographically to include oil produced in Alaska (or elsewhere) north of the Arctic Circle. What is prohibited, the Court indicated, is favoritism to particular states in the absence of other valid bases of classification. Because Congress could have achieved the same result through a classification tailored to the "disproportionate costs and difficulties . . . associated with extracting oil from this region," [36] the fact that Congress described the exemption in geographic terms does not invalidate it.

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[31] 99 L.Ed.2d at 611.
[32] 485 U.S. —, 99 L.Ed.2d 592 (1988).
[33] 99 L.Ed.2d at 610.
[34] 99 L.Ed.2d at 610, n.13.
[35] 462 U.S. 74 (1983).
[36] *Id.*, at 85.

Spending for the General Welfare

— Scope of the Power

[P. 150, add new paragraph at end of section:]

The Court restated the current restrictions on spending power exercise in *South Dakota* v. *Dole*.[37] First, "the exercise of the spending power must be in pursuit of 'the general welfare.' In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. Second, we have required that if Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously. . . .' Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.' . . . Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." [38]

— Social Security Act Cases

[P. 150, in text preceding last sentence of section, add:]

Also not amounting to unconstitutional coercion is the "relatively mild encouragement" represented by the withholding of 5% of federal highway funds to states refusing to cooperate in establishing a uniform minimum drinking age.[39]

[P. 150, add to N.18:]

South Dakota v. *Dole*, 483 U.S. —, 97 L.Ed.2d 171, 179 (1987) (conditioning receipt of highway funds on states' establishing minimum drinking age of 21 is "directly related to one of the main purposes for which highway funds are expended—safe interstate travel").

— Conditional Grants-in-Aid

[P. 151, delete first sentence of N.23:]

[P. 151, in text following N.23, add:]

Also, Congress may provide for recovery from States of funds misused in violation of valid conditions attached to voluntary receipt.[40]

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[37] 483 U.S. —, 97 L.Ed.2d 171 (1987).

[38] 97 L.Ed.2d at 178–79 (citations omitted).

[39] *South Dakota* v. *Dole*, 483 U.S. —, 97 L.Ed.2d 171, 181 (1987).

[40] *Bell* v. *New Jersey*, 461 U.S. 773 (1983); *Bennett* v. *Kentucky Dep't of Education*, 470 U.S. 656 (1985). See also *Bennett* v. *New Jersey*, 470 U.S. 632 (1985) (subse-

In exercise of the spending power, Congress may refuse to subsidize exercise of First Amendment rights, but it may not deny benefits solely on the basis of exercise of these rights. The distinction between these two closely related principles seems to hinge on the severity of the restriction placed on exercise of First Amendment rights. In *Regan* v. *Taxation With Representation,*[41] the Court held that Congress could constitutionally limit tax-exempt status under § 501(c)(3) of the Internal Revenue Code to charitable organizations that do not engage in lobbying. "Congress has merely refused to pay for the lobbying out of public moneys," the Court concluded.[42] The effect of the ruling on the organization's lobbying activities was minimal, however, since it could continue to receive tax-deductible contributions by creating a separate tax-exempt affiliate to conduct the lobbying. In *FCC* v. *League of Women Voters,*[43] on the other hand, the Court held that the First Amendment rights of public broadcasting stations were abridged by a prohibition on all editorializing by any recipient of public funds. There was no alternative means, as there had been in *Taxation With Representation,* by which the stations could continue to receive public funding and create an affiliate to engage in the prohibited speech. The Court rejected dissenting Justice Rehnquist's argument that the general principles of *Taxation With Representation* and *Oklahoma* v. *Civil Service Comm'n* should be controlling.[44]

In *South Dakota* v. *Dole,* the Court, rejecting a claim that withholding a fraction of federal highway funds from states not cooperating in a uniform minimum drinking age is barred by the Twenty-first Amendment, elaborated on the "independent constitutional bar" limitation on exercise of the spending power. The bar, the Court explained, "is not . . . a prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly. Instead . . . the power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[45]

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quent relaxation of grant conditions, not made retroactive by Congress, will not be applied retroactively by Court to excuse the State's noncompliance).

[41] 461 U.S. 540 (1983).

[42] 461 U.S. at 545.

[43] 468 U.S. 364 (1984).

[44] 468 U.S. at 399–401, & 401 n.27.

[45] 483 U.S. —, 97 L.Ed.2d 171, 180 (1987).

POWER TO REGULATE COMMERCE

Purposes Served by the Grant

[P. 153, add in text as second sentence of first paragraph:]

"The Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body." [46]

Definition of Terms

[P. 156, add to end of N.23:]

EEOC v. *Wyoming*, 460 U.S. 226 (1983).

[P. 156, add concluding paragraph to section:]

The Court overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Auth.*,[47] again a 5 to 4 resolution of the issue, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection. Justice Blackmun's opinion for the Court in *Garcia* concluded that the Court in 1976 had "tried to repair what did not need repair." [48] The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Clause itself, but in the structure of the Federal Government and in the political processes. "[W]e have no license to employ free-standing conceptions of state sovereignty when measuring congressional authority under the Commerce Clause." [49] While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits." [50] Moreover, the *National League of Cities* test for "traditional governmental function" had proven "unworkable [and] also inconsistent with established principles of federalism." [51] Lower courts and the Supreme Court itself had been unable to articulate "an organizing principle" or test for "traditional governmental functions." Regardless of whether a strictly historical test or some other test for "integral" or "necessary" govern-

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[46] *White* v. *Massachusetts Council of Construction Employers*, 460 U.S. 204, 213 (1983).

[47] 469 U.S. 528 (1985).

[48] *Id.*, at 557.

[49] *Id.*, at 550.

[50] *Id.*, at 556.

[51] *Id.*, at 531.

mental functions had been tried, Justice Blackmun explained, the "fundamental problem" is that any such test subverts the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." "States must be equally free [from such judicial second-guessing] to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else . . . deems state involvement to be." [52]

In *South Carolina* v. *Baker* the Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraordinary defects in the national political process" before the Court will apply substantive judicial review standards to claims that Congress has regulated state activities in violation of the Tenth Amendment.[53] A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." [54] Thus, the general rule is that "limits on Congress' authority to regulate state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." [55]

Congressional Regulation of Waterways

[P. 168, add to N.25:]

See also *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985), where congressional power to regulate "wetlands" was assumed, and the only questions involved statutory construction and Fifth Amendment taking.

Criminal Law

[P. 199, add to text following N.19:]

Even more far-reaching was the Court's upholding of a federal prohibition on malicious destruction of any building used in any activity affecting interstate commerce, as applied to attempted arson of a 2-unit apartment building.[56] While *Perez* emphasized that or-

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[52] *Id.*, at 546. By implication, limitations on state experimentation resulting from commerce power exercise do not pose the same difficulties.

[53] 485 U.S. —, 99 L.Ed.2d 592, 603 (1988). Justice Scalia, in a separate concurring opinion, objected to this language as departing from the Court's assertion in *Garcia* that the "constitutional structure" imposes some affirmative limits on congressional action.

[54] Id.

[55] Id. at 602.

[56] *Russell* v. *United States*, 471 U.S. 858 (1985) (interpreting 18 U.S.C. § 844(i)).

ganized crime operated on a national scale and that local loan-sharking activities were commonly used to finance organized crime's national operations, the Court in *Russell* merely pointed to the fact that the rental of real estate "unquestionably" affects interstate commerce, and that "the local rental of an apartment unit is merely an element of a much broader commercial market in real estate." [57] If the only test is whether the aggregate of local criminal activity can be said to affect commerce, then the possible reach of federal criminal law is broad indeed.[58]

Judicial Formulas

[P. 203, add as note at end of second sentence of section:]

For a recent holding that "direct" state regulation of interstate commerce is invalid, see *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986).

[P. 203, add new paragraph following N.2:]

The general principles have recently been restated by the Court.[59] "This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.[60] When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.[61] We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike* v. *Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." [62] That not all

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[57] Id. at 862.

[58] See Justice Stewart's dissent in *Perez*, 402 U.S. at 157.

[59] *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

[60] Citing: *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1925); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640–43 (1982) (plurality opinion).

[61] Citing *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970).

[62] Citing *Raymond Motor Transp., Inc.* v. *Rice*, 434 U.S. 429, 440–41 (1978). *See also Bendix Autolite Corp.* v. *Midwesco Enterprises*, 108 S. Ct. 2218 (1988) (applying second-tier balancing standard to state statute discriminating against out-of-state corporations in the availability of statute of limitations defense).

dormant commerce cases fall within this two-tiered approach, however, is suggested by *CTS Corp.* v. *Dynamics Corp. of America,* in which the Court emphasized the state's legitimate interest in regulating the governing rules of domestically chartered corporations, and did not proceed to balance that state interest against the burden on interstate commerce.[63]

[P. 203, add to N.3:]

See also Justice Scalia's recent criticism of *Pike* v. *Bruce Church* balancing as "ill suited to the judicial function." *CTS Corp.* v. *Dynamics Corp. of America,* 481 U.S. —, 95 L.Ed.2d 67, 89 (1987) (concurring). As an alternative, Justice Scalia would retain first-tier analysis and leave second-tier balancing issues to Congress. *Bendix Autolite Corp.* v. *Midwesco Enterprises,* 108 S. Ct. 2218, 2223 (1988) (concurring).

Insurance

[P. 243, add to N.16:]

See also Metropolitan Life Ins. Co. v. *Ward,* 470 U.S. 869, 878 (1985) (holding discriminatory tax invalid under equal protection, and explaining that such favoring of domestic industry "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent").

[P. 243, at end of section add new paragraph:]

While Congress may authorize states to burden interstate commerce in ways that would otherwise be impermissible,[64] congressional intent to do so "must be unmistakably clear." [65] Thus, the fact that federal statutes and regulations had restricted commerce in timber harvested from national forest lands in Alaska was "insufficient indicium" that Congress intended to authorize the State to apply a similar policy for timber harvested from state lands. The rule requiring clear congressional approval for state burdens on commerce was said to be necessary in order to strengthen the likelihood that decisions favoring one section of the country over another are in fact "collective decisions" made by Congress rather than unilateral decisions imposed on unrepresented out-of-state interests by individual states.[66] The same rule is required when the

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[63] 481 U.S. —, 95 L.Ed.2d 67 (1987) (involving allegation that state law governing acquisition of control shares in a corporation burdens the interstate corporate takeover market).

[64] "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp* v. *Board of Governors of the Federal Reserve System,* 472 U.S. 159, 174 (1985) (interpreting the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the state in which the acquired bank is located).

[65] *South-Central Timber Dev., Inc.* v. *Wunnicke,* 467 U.S. 82, 90 (1984).

[66] *Id.,* at 92. Earlier cases had required express statutory sanction of state burdens on interstate commerce, but under circumstances arguably less suggestive of

issue is not exemption from Commerce Clause scrutiny, but rather a lower standard of review. "An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation, regardless of whether the purported authorization takes the form of a flat exemption from Commerce Clause scrutiny or the less direct form of a reduction in the level of scrutiny." [67]

[P. 244, add to N.7 following cite to *Commonwealth Edison*:]

D.H. Holmes Co. v. *McNamara*, 485 U.S. —, 108 S. Ct. 1619, 100 L.Ed.2d 21 (1988) (imposition of Louisiana use tax on catalogs printed outside the state at the direction of an in-state corporation, and shipped to prospective customers within the state, satisfies *Complete Auto* test).

[P. 244, add to end of N.7:]

Container Corp. of America v. *Franchise Tax Bd.*, 463 U.S. 159 (1983); *Wardair Canada Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1 (1986) (presumptive federal policy of uniformity is belied by absence of preemptive language in 70 bilateral agreements).

[P. 245, in text following N.8, add:]

Also required is an appropriate definition of the scope of the business operation, sometimes a difficult task, given the complexity of modern corporations and their frequent diversification and control of subsidiaries. The rule is that there must be "some bond of ownership or control uniting the purported 'unitary business' [and that] the out-of-state activities of the purported 'unitary business' [must] be related in some way to the in-state activities." [68]

[P. 245, add to N. 12:]

Container Corp. v. *Franchise Tax Bd.*, 463 U.S. 159 (1983) (upholding use of the "three-factor" apportionment formula, based on the percentages of a unitary business' total payroll, property, and sales, that are located in the state).

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congressional approval. See, e.g., *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 958–60 (1982) (congressional deferral to state water law in 37 statutes and numerous interstate compacts does not indicate congressional sanction for *invalid* state laws imposing a burden on commerce); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982) (disclaimer in Federal Power Act of intent to deprive a state of "lawful authority" over interstate transmissions held not to evince a congressional intent "to alter the limits of state power otherwise imposed by the Commerce Clause").

[67] *Maine* v. *Taylor*, 477 U.S. 131, 139 (1986) (holding that the Lacey Act's reinforcement of state bans on importation of fish and wildlife neither authorizes state laws otherwise invalid under the Commerce Clause nor shifts analysis from the presumptively invalid category of outright discrimination against commerce to the *Pike* v. *Bruce Church* balancing standard for state laws that burden commerce only incidentally).

[68] *Container Corp.* v. *Franchise Tax Board*, 463 U.S. 159, 166 (1983), citing *ASARCO Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 316–17 (1982).

[P. 246, add to N.13:]

See also *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. —, 97 L.Ed.2d 226, 241 (1987) ("central tenet" is that "Clause 'by its own force created an area of trade free from interference by the States,' " hence flat tax on privilege of using a state's highways is invalid while tax apportioned to mileage traveled would not be).

[P. 246, add to N.14 following first citation:]

Westinghouse Elec. Corp. v. *Tully*, 466 U.S. 388 (1984); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. —, 100 L.Ed.2d 302 (1988) (Ohio statute granting a tax credit for ethanol fuel if the ethanol was produced in Ohio, or if produced in another state which grants a similar credit to Ohio-produced ethanol fuel, discriminates against interstate commerce in violation of the Commerce Clause).

[P. 246, add to text following N. 14:]

The test is not actual discriminatory impact on the taxpayer, dependent upon the tax schemes of the taxpayer's home state and other states in which the taxpayer operates, but rather whether the tax, if applied by every jurisdiction, would discriminate against interstate commerce.[69]

Foreign Corporations: State Regulation

[P. 268, add to N.19 following citation to *Allenberg Cotton*:]

Nor may a state deny the protection of its statute of limitations to a foreign corporation, having no in-state corporate office and not registered to do business in state, that refuses to appoint a local agent and thereby subject itself to the general jurisdiction of that state's courts. *Bendix Autolite Corp.* v. *Midwesco Enterprises*, 108 S. Ct. 2218 (1988).

State Conservation and Embargo Measures

[P. 273, add to text following first full sentence on page:]

The Court did find a legitimate local interest supporting an outright ban on importation of live bait in a case where the state was able to establish that imported bait may carry parasites inimical to state fish populations, and that no less discriminatory regulation was possible because adequate inspection and testing techniques for the parasites had not yet been devised.[70]

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[69] *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984); *Tyler Pipe Indus.* v. *Washington State Dep't of Revenue*, 483 U.S. —, 97 L.Ed.2d 199 (1987).

[70] *Maine* v. *Taylor*, 477 U.S. 131 (1986).

The Modern Standard: Balancing

[P. 276, add new note to end of section's last sentence:]

See also CTS Corp. v. *Dynamics Corp. of America*, 481 U.S. —, 95 L.Ed.2d 67, 88 (1987) (state corporate takeover law does not violate Commerce Clause merely because it will limit the number of successful takeovers; in the absence of federal preemption or discrimination against nonresident corporations, states need not protect particular methods of operation in the interstate market for corporate control).

The State Proprietary Activity Exception

[P. 276, in text following N.24, add:]

Similarly, the Court has held that a city may favor its own residents in the award of construction projects paid for with city funds, since the city is acting as a market participant.[71]

State Laws Regulating Alcoholic Beverages

[P. 278, add to text at end of section:]

The Court has made clear, however, that the Twenty-first Amendment does not completely insulate state regulation of alcoholic beverages from Commerce Clause restraint. "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." [72] Thus exemption of locally-distilled products from an excise tax on wholesale liquor sales is an invalid discrimination in favor of local products,[73] and a state "affirmation law" prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce.[74]

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[71] *White* v. *Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983). Moreover, through exercise of the spending power, Congress may "permit the type of parochial favoritism" that would otherwise run afoul of the Commerce Clause; the city's use of federal funds to favor city residents was held to have been affirmatively sanctioned by the funding statute. Id., at 213. For a case in which the Court had difficulty in applying the market participant exception (there was no opinion of the Court on the issue), see *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82 (1984) (Alaska requirement that timber harvested from state-owned lands be processed in Alaska before being shipped outside state violates Commerce Clause).

[72] *Bacchus Imports, Ltd.*, v. *Dias*, 468 U.S. 263, 276 (1984).

[73] *Id.*

[74] *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986).

CONCURRENT FEDERAL AND STATE JURISDICTION

The General Issue: Preemption

[P. 286, add new paragraph in text following N.14:]

The vast quantity and broad sweep of federal law, both statutory and regulatory, assures that numerous preemption issues will arise, and the Court decided a number of preemption cases during its 1982 to 1987 terms. The Court considered both express and implied preemption, and in the latter category decided cases in both major subdivisions of analysis: whether the federal occupation of a field of regulation is so pervasive as to oust any state regulation, and whether state regulation actually conflicts with the federal law or with effectuation of the congressional purpose. For the most part the Court did not plow new ground, but rather applied settled preemption principles; in these cases the Court's task was to interpret and apply the relevant statutes to ascertain the intended scope of preemption. Most noteworthy was the Court's holding that state tort law governing liability arising out of the performance of federal procurement contracts may be preempted by federal common law; where such preemption is deemed desirable due to implication of "uniquely federal" interests, the test applied for conflict with federal policies is less rather than more stringent than that applied in the case of legislation. Also, the Court refined principles governing when federal regulations may be held to have preempted state law.

The increasing frequency with which Congress attempts to spell out the extent of preemption led to several decisions interpreting preemptive language. Here the Court was determining the applicability of principles restated in *Jones* v. *Rath Packing Co.*:[75] had Congress expressed a clear intent to preempt state law under the circumstances of the case? A prohibition on state taxes on carriage of air passengers "or on the gross receipts derived therefrom" was held to preempt a state tax on airlines, described by the state as a personal property tax, but based on a percentage of the airline's gross income; "the manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision are to impose a levy upon the gross receipts of airlines."[76] State common law as well as state

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[75] 430 U.S. 519 (1977).

[76] *Aloha Airlines* v. *Director of Taxation*, 464 U.S. 7, 13–14 (1983). For another instance of express preemption, *see Exxon Corp.* v. *Hunt*, 475 U.S. 355 (1986) (114(c) of the Comprehensive Environmental Response, Compensation, and Liability Act preempts special state taxes for state superfunds used to pay response costs and other claims compensable under the federal law).

statutory law can be preempted by broad language.[77] Express disclaimers of preemptive intent and express limitations on preemptive reach can also be given effect once interpreted and applied. Hence, a broad ERISA preemption of any state laws which "relate to" employee benefit plans is ameliorated by a proviso that the preemption provision is not to be construed to "modify" or "impair" any other federal law,[78] and by an exception for state laws regulating insurance.[79] Similarly, Congress may affirmatively authorize state regulation that would otherwise be invalid under the Commerce Clause.[80]

The Court reaffirmed that federal regulations as well as federal statutes may preempt state law, but indicated that a more rigorous test may govern at least one aspect of preemption by regulation. As long as the federal agency is acting within the scope of its delegated authority,[81] its regulations may explicitly preempt state law.[82] However, the Court has suggested that there must be ex-

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[77] *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. —, 95 L.Ed.2d 39 (1987).

[78] *Shaw* v. *Delta Air Lines*, 463 U.S. 85 (1983) (no preemption of provisions of state human rights law prohibiting pregnancy discrimination in plans subject to ERISA coverage, since state human rights law plays a significant role in enforcement of Title VII of the Civil Rights Act).

[79] *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985). *But cf. Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. —, 95 L.Ed.2d 39 (1987). *See also Goodyear Atomic Corp.* v. *Miller*, 486 U.S. —, 108 S. Ct. 1704, 100 L.Ed.2d 158 (1988) (application of Ohio workers'compensation supplemental award for employer's failure to observe state safety regulation is not preempted as applied to operation of federal facility by private contractor, because 40 U.S.C. § 290 "provides the requisite clear congressional authorization for the application of the provision").

[80] *Northeast Bancorp* v. *Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985) (upholding the Douglas Amendment to the Bank Holding Company Act, 12 U.S.C. § 1842(d), permitting regional interstate bank acquisitions expressly approved by the state in which the acquired bank is located).

[81] *Louisiana Public Service Comm'n* v. *FCC*, 476 U.S. 355 (1986) (Communication Act's denial of jurisdiction to the FCC "with respect to . . . intrastate communication service" prevents FCC from applying its depreciation rules to state regulation of telephone equipment used in both interstate and intrastate commerce). "[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority." 476 U.S. at 374. *But see City of New York* v. *FCC*, 486 U.S. —, 108 S. Ct. 1637, 100 L.Ed.2d 48 (1988) (FCC did not exceed its authority under the Cable Communications Policy Act of 1984 by preempting state and local regulation of technical cable signal quality standards, since the agency's position represents a reasonable accommodation of conflicting congressional policies, and since neither the statute nor its legislative history compels conclusion that Congress would not have sanctioned this position).

[82] *Capital Cities Cable* v. *Crisp*, 467 U.S. 691 (1984), following *Fidelity Federal Savings and Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141 (1982): FCC regulations have explicitly preempted state regulation of "signal carriage," and this comprehends commercial advertising (here the state banned advertising of alcohol) carried on cable TV.

press preemption or direct conflict with federal regulations before it will hold state law to be preempted; the comprehensiveness of federal regulations may be insufficient basis for a finding of preemption. "We are even more reluctant to infer preemption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer preemption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule . . . would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence." [83]

The Court remains willing to hold that Congress has by statute so comprehensively occupied a field as to leave no room for state regulation, and the fact that Congress has done so by conferring broad jurisdiction on an administrative agency apparently does not restrict operation of the principle.[84] Also, the fact that Congress has partially "deregulated" a subject by constricting agency jurisdiction does not necessarily open the field for state regulation, since Congress can occupy a field by opting for market regulation over any governmental regulation.[85] On occasion, however, the Court has narrowly defined the field of exclusive federal regulation and has thereby upheld state regulation. For example, the Atomic Energy Act's preemption of the safety aspects of nuclear power was held not to invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities are available to treat nuclear waste, since "economic" regulation of power generation has traditionally been left to the states—an arrangement maintained by the Act—

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[83] *Hillsborough County* v. *Automated Medical Laboratories*, 471 U.S. 707, 717 (1985).

[84] In *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 184 (1983), the Court held that a State prohibition on pass-through of a severance tax on oil and gas conflicted with FERC authority under the Natural Gas Act because it "represented an attempt to legislate in a field that Congress has chosen to occupy"—"the field of wholesale sales of natural gas in interstate commerce." *See also Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. —, 99 L.Ed.2d 316 (1988) (Natural Gas Act preempts state regulation of securities issuance by covered gas companies).

[85] *Transcontinental Gas Pipe Line Corp.* v. *Mississippi Oil and Gas Board*, 474 U.S. 409 (1986). The same rules of preemption apply to deregulation, however: there must be a clear and manifest congressional purpose to preempt, and this purpose must be grounded in statutory text. *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. —, 99 L.Ed.2d 582 (1988).

and since the state law could be justified as an economic rather than a safety regulation.[86]

In addition, there are "a few areas involving 'uniquely federal interests,' " where state law is pre-empted and replaced not by statutory or regulatory law, but by "federal common law"—i.e., "by federal law of a content prescribed (absent explicit statutory directive) by the courts." [87] In *Boyle* v. *United Technologies Corp.*, the Court determined that "civil liabilities arising out of the performance of federal procurement contracts" is one such area; [88] thus, the court held, state tort law governing design defects in military equipment may be displaced by the need for a government contractor defense. Displacement of state law occurs if the court identifies a "significant conflict" between the unique federal policy or interest and the operation of state law. Moreover, that conflict with federal policy "need not be as sharp as that which must exist for ordinary preemption when Congress legislates. . . . [I.e.] the fact that the area in question *is* one of unique federal concern changes what would otherwise be a conflict that cannot produce pre-emption into one that can." [89]

Several cases called for application of the *Hines* v. *Davidowitz* test of whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [90] A State law recognizing the validity of an unrecorded, oral sale of an aircraft was held preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft's title readily available by requiring that all transfers be documented and recorded.[91] Also, a State law making agricultural producers' associations

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[86] *Pacific Gas & Elec. Co.* v. *Energy Resources Conserv. and Dev. Comm'n*, 461 U.S. 190 (1983). Neither does the same reservation of exclusive authority to regulate nuclear safety preempt imposition of punitive damages under state tort law, even if based upon a jury's conclusion that a nuclear licensee failed to follow adequate safety precautions. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[87] *Boyle* v. *United Technologies Corp.*, 487 U.S. —, 101 L.Ed.2d 442, 452–53 (1988) (quoting *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981)).

[88] 101 L.Ed.2d at 454. This principle applies when the civil liability arises out of a dispute between a government contractor and another private party. Other previously identified "uniquely federal interests" were rights and obligations of the United States under its contracts (citing, e.g., *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 592–94 (1973)), and "civil liability of federal officials for actions taken in the course of their duty" (citing, e.g., *Westfall* v. *Erwin*, 484 U.S. —, 98 L.Ed.2d 619 (1988)).

[89] *Id.* at 455.

[90] 312 U.S. 52, 67 (1941).

[91] *Philco Aviation* v. *Shacket*, 462 U.S. 406 (1983).

the exclusive bargaining agents and requiring payment of service fees by non-member producers was held to counter a strong federal policy protecting the right of farmers to join or not join such associations.[92] On the other hand, the effect on federal policy was not strong enough to warrant a holding of preemption when a state authorized condemnation of abandoned railroad property after conclusion of an ICC proceeding permitting abandonment, although the railroad's opportunity costs in the property had been considered in the decision on abandonment.[93] The Court also sometimes defines the congressional purpose in a manner promoting harmony of state laws.[94] And, where there is "tension" between two policies embodied in the same federal act, a state law fully consistent with one of these policies but at odds with the other will not be held to be preempted as frustrating overall congressional policy.[95]

Federal Versus State Labor Laws

[P. 287, add to N.18:]

State limitations on holding union office have recently been upheld, the Court ruling that *Hill's* premise that the NLRA grants an unqualified right to select union officials has been removed by amendments prohibiting some convicted criminals from holding union office. Partly because the federal disqualification standard was itself dependent upon application of state law, the Court ruled that more stringent state disqualification provisions, also aimed at individuals who had been in-

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[92] *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461 (1984) (interpreting the Agricultural Fair Practices Act of 1967, 7 U.S.C. § 2301 et seq.). For similar preemption rulings, *see Nantahala Power and Light Co.* v. *Thornburg*, 476 U.S. 953 (1986) (state allocation of costs for purposes of setting retail electricity rates, by disallowing costs permitted by FERC in setting wholesale rates, frustrates federal regulation by possibly preventing the utility from recovering in its sales the costs of paying the FERC-approved wholesale rate); *Capital Cities Cable* v. *Crisp*, 467 U.S. 691 (1984) (state ban on cable TV advertising frustrates federal policy in the Copyright Revision Act of 1976 by which cable operators pay a royalty fee for the right to retransmit distant broadcast signals upon agreement not to delete commercials); *International Paper Co.* v. *Ouellette*, 479 U.S. 481 (1987) (damage action based on common law of downstream state frustrates Clean Water Act's policies favoring permitting state in interstate disputes and favoring predictability in the permit process); *Felder* v. *Casey*, 487 U.S. —, 101 L.Ed.2d 123 (1988) (state notice-of-claim statute frustrates remedial objectives of civil rights law as applied to actions brought in state court under 42 U.S.C. § 1983).

[93] *Hayfield Northern R. Co.* v. *Chicago & N. W. Transp. Co.*, 467 U.S. 622 (1984).

[94] *California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272 (1987) (Pregnancy Discrimination Act's requirement that pregnant women be treated "the same" as other persons created a "floor" but not a "ceiling," hence states could provide preferential treatment); *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. —, 95 L.Ed.2d 67 (1987) (Williams Act's broad purpose of protecting shareholders as a group is furthered by state takeover law); *Rose* v. *Rose*, 481 U.S. —, 95 L.Ed.2d 599 (1987) (provision governing veterans' disability benefits protects veterans' families as well as veterans, hence state child support order resulting in payment out of benefits is not preempted).

[95] *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984).

volved in racketeering and other criminal conduct, were not inconsistent with the federal law. *Brown* v. *Hotel Employees*, 468 U.S. 491 (1984).

[P. 288, add to N.3:]

Similarly, states may not supplement Board enforcement by debarring from state contracts persons or firms that have violated the NLRA. *Wisconsin Dep't of Industry* v. *Gould Inc.*, 475 U.S. 282 (1986).

[P. 288, in text following N.3, add:]

Section 7's protection of associational rights is not so strong, however, as to outweigh the Social Security Act's policy permitting states to determine whether to award unemployment benefits to persons voluntarily unemployed as the result of a labor dispute.[96]

[P. 289, add to N.7:]

State court action by a supervisor alleging union interference with his contractual relationship with his employer is preempted by the NLRA. *Local 926, International Union of Operating Engineers* v. *Jones*, 460 U.S. 669 (1983) (applying *Iron Workers* v. *Perko*).

[P. 290, add to N.13:]

State court action for misrepresentation and breach of contract, brought by replacement workers promised permanent employment when hired during a strike, was not preempted by the NLRA. The action for breach of contract by replacement workers having no remedies under the NLRA is deeply rooted in local law and of only peripheral concern under the Act. *Belknap, Inc.* v. *Hale*, 463 U.S. 491 (1983) (following *Linn* v. *Plant Guard Workers* and *Farmer* v. *Carpenters*). Similarly, an action in state court against a union for misrepresentation in promising assistance if an employee were discharged for union-related activity is not preempted where the union failed to establish an arguable case that the individual was an employee within the meaning of the NLRA rather than an unprotected supervisor. *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986). Where state law regulates conduct that is actually protected by the NLRA, however, this line of cases in inapplicable. *Brown* v. *Hotel Employees*, 468 U.S. 491, 503 (1984).

[P. 292, in text following N.20 add:]

A state tort action as an alternative to a § 301 arbitration or enforcement action is preempted if it is substantially dependent upon analysis of the terms of a collective bargaining agreement.[97]

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[96] *New York Telephone Co.* v. *New York Labor Dept.*, 440 U.S. 519 (1979); *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471 (1977); *Baker* v. *General Motors Corp.*, 478 U.S. 621 (1986).

[97] *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985). A state damage action for the bad-faith handling of an insurance claim under a disability plan that was part of a collective bargaining agreement was preempted because it involved interpretation of that agreement, and because state enforcement would frustrate the policies of § 301 favoring uniform federal law interpretation of collective bargaining agreements and favoring arbitration as a predicate to adjudication. *See also International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. —, 95 L.Ed.2d 791 (1987) (state law claim that union breached duty to furnish employee a reasonably safe workplace). *Cf.*

[P. 292, add to N.21, following citation to *Machinists*:]

Golden Gate Transit Corp. v. *City of Los Angeles*, 475 U.S. 608 (1986) (City may not condition taxicab franchise on settlement of strike by set date, since this intrudes into the collective bargaining process protected by the NLRA).

[P. 292, in text following N.21 add:]

However, the NLRA is concerned primarily "with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," so states are free to impose minimum labor standards.[98]

COMMERCE WITH INDIAN TRIBES

[P. 292, add to N.1:]

This special fiduciary responsibility can also be created by statute. *See, e.g.*, *United States* v. *Mitchell*, 463 U.S. 206 (1983) (statutes giving the Secretary of the Interior full responsibility to manage Indian forest lands and sell timber for the benefit of Indian owners create a trust relationship under which the tribe or individual may sue the trustee for damages).

[P. 293, add to N.6:]

New Mexico v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) (state regulation of on-reservation hunting and fishing by non-members of the tribe is preempted because it would undermine tribal control over reservation lands and resources, and because it would "threaten Congress' overriding objective of encouraging tribal self-government and economic development").

[P. 293, add to text following N. 6:]

A corollary is that preemption will not be applied strictly to prevent states from aiding Indians.[99] However, the protective rule is inapplicable to state regulation of liquor transactions, where there has been no tradition of tribal sovereignty.[100]

Lingle v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. —, 100 L.Ed.2d 410 (1988) (state tort law action for retaliatory discharge for exercising rights under state Workers' Compensation Act is not preempted by § 301, there being no required interpretation of a collective bargaining agreement).

[98] *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724 (1985) (upholding a state requirement that health care plans, including those resulting from collective bargaining, provide minimum benefits for mental health care).

[99] *Three Affiliated Tribes* v. *Wold Engineering*, 467 U.S. 138 (1984), upholding state court jurisdiction to hear claims of Indians against non-Indians involving transaction that occurred in Indian country. However, attempts by states to retrocede jurisdiction favorable to Indians may be held to be preempted. See *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877 (1986).

[100] *Rice* v. *Rehner*, 463 U.S. 713 (1983).

[P. 293, add to N.8:]

Montana v. *Blackfeet Tribe*, 471 U.S. 759 (1985) (State may not tax tribe's royalty interest from lease of reservation minerals).

[P. 294, add to N.12:]

See also California v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (state regulation of on-reservation bingo is preempted as basically civil/regulatory rather than criminal/prohibitory). The extent of civil jurisdiction over non-Indians requires close examination of the relevant statutes and treaties. Generally, however, comity requires a federal court to stay its hand pending resolution of jurisdictional issues within the tribal court system. *National Farmers Union Insurance Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985) (federal question jurisdiction); *Iowa Mut. Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987) (diversity jurisdiction).

[P. 294, add new note at end of sentence preceding N.14 quotation:]

See, e.g., Oregon Dep't of Fish and Wildlife v. *Klamath Indian Tribe*, 473 U.S. 753 (1985) (cession of aboriginal title resulted in loss of hunting and fishing rights in lands not retained in reservation).

[P. 294, add to N.14:]

Escondido Mut. Water Co. v. *La Jolla Band*, 466 U.S. 765, 787 n.30 (1984).

[P. 294, add to text following N.14:]

In a case of major import for the settlement of Indian land claims, the Court ruled in *County of Oneida* v. *Oneida Indian Nation* [101] that an Indian tribe may obtain damages for wrongful possession of land conveyed in 1795 without the federal approval then required by the Nonintercourse Act.[102] The Nonintercourse Acts reflected the accepted principle that extinguishment of Indian title requires the consent of the United States, and left intact a tribe's common law remedies to protect possessory rights. The Court reiterated the accepted rule that enactments are construed liberally in favor of Indians, and that Congress may abrogate Indian treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land conveyance treaties containing references to earlier conveyances that had violated the Nonintercourse Acts did not constitute ratification of the invalid conveyances.[103] Similarly, the Court refused to apply the general rule for borrowing a state statute of limitations for the federal common law action, and rejected the dissent's view that, given "the extraordinary passage of time," the doctrine of laches should have been applied to bar the claim.[104]

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[101] 470 U.S. 226 (1985).
[102] 1 Stat. 379 (1793).
[103] 470 U.S. at 246–48.
[104] 470 U.S. at 255, 257 (Stevens, J.).

[P. 294, add to N.17:]

There must be "substantial and compelling evidence of a congressional intention to diminish Indian lands" before the Court will hold that a statute has removed lands from a reservation. *Solem* v. *Bartlett*, 465 U.S. 463, 472 (1984).

BANKRUPTCY

Constitutional Status of State Insolvency Laws: Preemption

[P. 315, add to text following N.8:]

A state court injunction ordering a defendant to clean up a waste disposal site has been held to be a "liability on a claim" subject to discharge under the Bankruptcy Code, after the state had appointed a receiver to take charge of the defendant's property and comply with the injunction.[105]

COPYRIGHTS AND PATENTS

Nature and Scope of the Right Secured

[P. 328, add to N.2:]

A major limitation of copyright law is that "fair use" of a copyrighted work is not an infringement. Fair use can involve such things as citation for the use of criticism, and reproduction for classroom purposes, but may not supersede the use of the original work. See *Harper & Row, Publishers* v. *Nation Enterprises*, 471 U.S. 539 (1985), holding that an unauthorized 300 to 400 word excerpt, published as a news "scoop" of the authorized pre-publication excerpt of former President Ford's memoirs and substantially affecting the potential market for the authorized version, was not a fair use within the meaning of section 107 of the Copyright Act, 17 U.S.C. § 107.

[P. 328, add new paragraph in text following N.2:]

The Court's "reluctance to expand [copyright] protections . . . without explicit legislative guidance" controlled its decision in *Sony Corp.* v. *Universal City Studios*,[106] in which the Court held that the manufacture and sale of video tape (or cassette) recorders for home use does not constitute "contributory" infringement of the copyright in television programs. Copyright protection, the Court reiterated, is "wholly statutory," and courts should be "circumspect" in extending protections to new technology. The Court refused to hold that contributory infringement could occur simply by supplying the device with which someone else could infringe, especially in view of the fact that VCRs are capable of substantial noninfringing "fair use," e.g., time-shifting of television viewing.

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[105] *Ohio* v. *Kovacs*, 469 U.S. 274 (1985).

[106] 464 U.S. 417, 431 (1984).

[P. 328, add to N.3:]

Sony Corp. v. *Universal City Studios*, 464 U.S. 417 (1984).

THE POWER TO RAISE AND MAINTAIN ARMED FORCES

Conscription

[P. 342, add to N.17:]

See also Selective Service System v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), upholding denial of federal financial assistance under Title IV of the Higher Education Act to young men who fail to register for the draft.

Care of the Armed Forces

[P. 343, add to text following N. 8:]

The Court, citing the unique military disciplinary structure as well as the expansive deference to congressional control as constituting "special factors counselling hesitation in the absence of affirmative action by Congress," has refused to recognize *Bivens* [107] constitutional tort actions brought by members of the military. Initially, the Court held that enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations had no cause of action.[108] These broad principles were then extended to bar a constitutional tort action for damages sustained by an officer who had been an unwitting, unconsenting subject of an Army experiment to test the effects of the drug LSD on human subjects.[109] In the latter case the Court held that the bar to *Bivens* actions is coextensive with the *Feres* exception to the Federal Tort Claims Act, i.e., that "no *Bivens* remedy is available for injuries that 'arise out of or are in the course of activity incident to service.' " [110]

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[107] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[108] *Chappell* v. *Wallace*, 462 U.S. 296 (1983).

[109] *United States* v. *Stanley*, 483 U.S. —, 97 L.Ed.2d 550 (1987).

[110] 97 L.Ed.2d at 567 (quoting *Feres* v. *United States*, 340 U.S. 135, 146 (1950)). The issue of whether the human testing program had constituted an "activity incident to service" had been resolved adversely to the plaintiff by lower court adjudication on the FTCA claim, and the Court, over vigorous dissent, did not reexamine that issue. For recent indication that the *Feres* doctrine may be subject to reconsideration, *see United States* v. *Johnson*, 481 U.S. —, 95 L.Ed.2d 648 (1987) (four dissenting Justices expressing the view that *Feres* should be overruled).

Trial and Punishment of Offenses: Servicemen

[P. 345, add new paragraph following N.5:]

O'Callahan was overruled in *Solorio* v. *United States*, the Court holding that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged." [111] Chief Justice Rehnquist's opinion of the Court asserted that *O'Callahan* had been based on erroneous readings of English and American history, and that "the service connection approach, even as elucidated in *Relford*, has proved confusing and difficult for military courts to apply." [112] Hence, even in a case in which the Court of Military Appeals had found service connection to be present, the Court was willing to overrule *O'Callahan* and abandon the service-connection test altogether.[113]

EX POST FACTO LAWS

Definition

[P. 382, add to N.5:]

Miller v. *Florida*, 482 U.S. —, 96 L.Ed.2d 351 (1987) (revised sentencing guidelines law, under which the presumptive sentences for certain offenses were raised, may not be applied to someone who committed any such offense before the revision).

OBLIGATION OF CONTRACTS

Evaluation of the Clause Today

[P. 429, add to N.28:]

In *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), the Court emphasized the first and relied on all but the third of these tests in upholding a prohibition on pass-through of an oil and gas severance tax.

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[111] 483 U.S. —, 97 L.Ed.2d 364 (1987).

[112] 97 L.Ed.2d at 377.

[113] The vote was 6–3, but with only five Justices favoring overruling. Justices White, Powell, O'Connor, and Scalia joined the Chief Justice's opinion, and Justice Stevens objected strenuously to "unnecessary overruling of precedent" while concurring in the judgment. Justice Marshall, joined by Justices Brennan, and Blackmun, dissented.

IMPORTS AND EXPORTS

Property Taxes

[P. 432, add to N.21 following first sentence:]

The Court's 1945 decision in *Hooven & Allison* was expressly overruled in *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), involving the same tax and the same parties.

[P. 432, add to N.22:]

Accord, R.J. Reynolds Tobacco Co. v. *Durham County*, 479 U.S. 130 (1986) (tax on imported tobacco stored for aging in customs-bonded warehouse and destined for domestic manufacture and sale); *but cf. Xerox Corp.* v. *County of Harris*, 459 U.S. 145, 154 (1982) (similar tax on goods stored in customs-bonded warehouse is preempted "by Congress' comprehensive regulation of customs duties"; case, however, dealt with goods stored for export).

INTERSTATE COMPACTS

Legal Effect

[P. 438, add to text following N.24:]

The Court in exercise of its original jurisdiction may enforce interstate compacts following principles of general contract law.[114]

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[114] *Texas* v. *New Mexico*, 482 U.S. —, 96 L.Ed.2d 105 (1987). And if the compact makes no provision for resolving impasse, then the Court may exercise its jurisdiction to apportion waters of interstate streams. In doing so, however, the Court will not rewrite the compact by ordering appointment of a third voting commissioner to serve as a tie-breaker; rather, the Court will attempt to apply the compact to the extent that its provisions govern the controversy. *Texas* v. *New Mexico*, 462 U.S. 554 (1983).

ARTICLE II

NATURE AND SCOPE OF PRESIDENTIAL POWER

[P. 452, add new section preceding "TENURE":]

Executive Power: Separation of Powers Protections

In recent cases the Court has applied separation of powers principles to invalidate what it perceived to be congressional usurpation of executive power. In striking down the congressional veto as circumventing Article I's bicameralism and presentment requirements attending exercise of legislative power, the Court also suggested in *Immigration and Naturalization Service* v. *Chadha* [1] that the particular provision in question, involving veto of the Attorney General's decision to suspend deportation of an alien, in effect allowed Congress impermissible participation in execution of the laws.[2] And in Bowsher v. *Synar*,[3] the Court held that Congress had invalidly vested executive functions in a legislative branch official. Underlying both decisions was the premise, stated by Chief Justice Burger's opinion of the Court in *Chadha*, that "the powers delegated to the three Branches are functionally identifiable," distinct, and definable.[4] On the other hand, the Court in the independent counsel case, while acknowledging that the contested statute did restrict to some degree a constitutionally delegated function, law enforcement, upheld the law upon a flexible analysis that emphasized that neither the Legislative nor the Judicial Branch had aggrandized its power and that the incursion into executive power did not impermissibly interfere with the President's constitutionally assigned functions.[5]

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[1] 462 U.S. 919 (1983).

[2] Although Chief Justice Burger's opinion of the Court described the veto decision as legislative in character it also seemingly alluded to the executive nature of the decision to countermand the Attorney General's application of delegated power to a particular individual. "Disagreement with the Attorney General's decision on Chadha's deportation . . . involves determinations of policy that Congress can implement in only one way. . . . Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 462 U.S. at 954-55.

[3] 478 U.S. 714 (1986).

[4] 462 U.S. at 951.

[5] *Morrison* v. *Olson*, 486 U.S. —, 108 S. Ct. 2597 (1988). The opinion by Chief Justice Rehnquist was joined by seven of the eight participating Justices. Only Justice Scalia dissented. Earlier, in *Young* v. *United States ex rel. Vuitton*, 481 U.S. —, 95 L.Ed.2d 740 (1987), the Court in upholding the power of federal judges to appoint private counsel to prosecute contempt of court actions had rejected the assertion that the judiciary usurped executive power in appointing such counsel.

At issue in *Synar* were the responsibilities vested in the Comptroller General by the "Gramm-Rudman-Hollings" Deficit Control Act,[6] which set maximum deficit amounts for federal spending for fiscal years 1986 through 1991, and which directed across-the-board cuts in spending when projected deficits would exceed the target deficits. The Comptroller was to prepare a report for each fiscal year containing detailed estimates of projected federal revenues and expenditures, and specifying the reductions, if any, necessary to meet the statutory target. The President was required to implement the reductions specified in the Comptroller's report. The Court viewed these functions of the Comptroller "as plainly entailing execution of the law in constitutional terms. Interpreting a law . . . to implement the legislative mandate is the very essence of 'execution' of the law," especially where "exercise [of] judgment" is called for, and where the President is required to implement the interpretation.[7] Because Congress by earlier enactment had retained authority to remove the Comptroller General from office, the Court held, executive powers may not be delegated to him. "By placing the responsibility for execution of the [Act] in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function." [8]

The Court in *Chadha* and *Synar* ignored or rejected assertions that its formalistic approach to separation of powers may bring into question the validity of delegations of legislative authority to the modern administrative state, sometimes called the "fourth branch." As Justice White asserted in dissent in *Chadha*, "by virtue of congressional delegation, legislative power can be exercised by independent agencies and Executive departments. . . . There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term." [9] Moreover, Justice White noted, "rules and adjudications by the agencies meet the Court's own definition of legislative action." [10] Justice Stevens, concurring in *Synar*, sounded the same chord in suggesting that the Court's holding should not depend on classification of "chameleon-like" powers as executive, legislative, or judicial.[11] The Court

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[6] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038.

[7] 478 U.S. at 732-33.

[8] *Id.* at 734.

[9] 462 U.S. at 985-86.

[10] 462 U.S. at 989.

[11] 478 U.S. at 736, 750.

answered these assertions on two levels: that the bicameral protection "is not necessary" when legislative power has been delegated to another branch confined to implementing statutory standards set by Congress, and that "the Constitution does not so require." [12] In the same context, the Court acknowledged without disapproval that it had described some agency action as resembling lawmaking.[13] Thus *Chadha* may not be read as requiring that all "legislative power" as the Court defined it must be exercised by Congress, and *Synar* may not be read as requiring that all "executive power" as the Court defined it must be exercised by the executive. A more limited reading is that when Congress elects to exercise legislative power itself rather than delegate it, it must follow the prescribed bicameralism and presentment procedures, and when Congress elects to delegate legislative power or assign executive functions to the executive branch, it may not control exercise of those functions by itself exercising removal (or appointment) powers.

A more flexible approach was followed in the independent counsel case. Here, there was no doubt that the statute limited the President's law enforcement powers. Upon a determination by the Attorney General that reasonable grounds exist for investigation or prosecution of certain high ranking government officials, he must notify a special, Article III court which appoints a special counsel. The counsel is assured full power and independent authority to investigate and, if warranted, to prosecute. Such counsel may be removed from office by the Attorney General only for cause as prescribed in the statute.[14] The independent counsel was assuredly more free from executive supervision than other federal prosecutors. Instead of striking down the law, however, the Court undertook a careful assessment of the degree to which executive power was invaded and the degree to which the President retained sufficient powers to carry out his constitutionally assigned duties. Also considered by the Court was the issue whether in enacting the statute Congress had attempted to aggrandize itself or had attempted to enlarge the judicial power at the expense of the executive.[15]

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[12] 462 U.S. at 953 n.16.

[13] *Id.*

[14] Pub. L. 95-521, title VI, 92 Stat. 1867, as amended by Pub. L. 97-409, 96 Stat. 2039, and Pub. L. 100-191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 et seq.

[15] 108 S. Ct. at 2620-22.

The Removal Power

[P. 552, in text following N.17, add:]

The Removal Power Rationalized.—The tension that had long been noticed between *Myers* and *Humphrey's Executor,* at least in terms of the language used in those cases but also to some extent in their holdings, appears to have been ameliorated by two decisions which purport to reconcile the cases but more important purport to establish, in the latter case, a mode of analysis for resolving separation of powers disputes respecting the removal of persons appointed under the appointments clause.[16] *Myers* struck down a law involving the Senate in the removal of postmasters, but the broad-ranging opinion had long stood for the proposition that inherent in the President's obligation to see to the faithful execution of the laws was his right to remove any executive officer as a means of discipline. *Humphrey's Executor* had qualified this proposition by upholding "for cause" removal restrictions for members of independent regulatory agencies, at least in part on the assertion that they exercised "quasi-" legislative and adjudicative functions as well as some form of executive function. Maintaining the holding of the latter case was essential to retaining the independent agencies, but the emphasis upon the execution of the laws as a core executive function in recent cases had cast considerable doubt on the continuing validity of *Humphrey's Executor.*

In *Bowsher* v. *Synar,*[17] the Court held that when Congress retains the power to remove an official it could not vest him with the exercise of executive power. Invalidated in *Synar* were provisions of the 1985 "Gramm-Rudman-Hollings" Deficit Control Act[18] vesting in the Comptroller General authority to prepare a detailed report on projected federal revenue and expenditures and to determine mandatory across-the-board cuts in federal expenditures necessary to reduce the projected budget deficit by statutory targets. By a 1921 statute, the Comptroller General was removable by joint congressional resolution for, *inter alia,* "inefficiency," "neglect of duty," or "malfeasance." "These terms are very broad," the Court noted, and "could sustain removal of a Comptroller General for

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[16] *Bowsher* v. *Synar,* 478 U.S. 714 (1986); *Morrison* v. *Olson,* 486 U.S. —, 108 S. Ct. 2597 (1988). This is not to say that the language and analytical approach of *Synar* are not in conflict with that of *Morrison;* it is to say that the results are consistent and the analytical basis of the latter case does resolve the ambiguity present in some of the reservations in *Synar.*

[17] 478 U.S. 714 (1986).

[18] The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038.

any number of actual or perceived transgressions of the legislative will." Consequently, the Court determined, "the removal powers over the Comptroller General's office dictate that he will be subservient to Congress."[19]

Relying expressly upon *Myers*, the Court concluded that "Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."[20] But *Humphrey's Executor* was also cited with approval, and to the contention that invalidation of this law would cast doubt on the status of the independent agencies the Court rejoined that the statutory measure of the independence of those agencies was the assurance of "for cause" removal by the President rather than congressional involvement as in the instance of the Comptroller General.[21] This reconciliation of *Myers* and *Humphrey's Executor* was made clear and express in *Morrison* v. *Olson*.[22]

That case sustained the independent counsel statute.[23] Under that law, the independent counsel, appointed by a special court upon application by the Attorney General, may be removed by the Attorney General "only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." Inasmuch as the counsel was clearly exercising "purely" executive duties, in the sense that term was used in *Myers*, it was urged that *Myers* governed and required the invalidation of the statute. But, said the Court, *Myers* stood only for the proposition that Congress could not involve itself in the removal of executive officers. Its broad dicta that the President must be able to remove at will officers performing "purely" executive functions had not survived *Humphrey's Executor*. It was true, the Court admitted, that in the latter case it had distinguished between "purely" executive officers and officers who exercise "quasi-legislative" and "quasi-judicial" powers in marking the line between officials who may be presidentially re-

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[19] 478 U.S. at 729, 730. "By placing the responsibility for execution of the . . . Act in the hands of an officer who is subject to removal only by itself, Congress in effect has retained control over the execution of the Act and has intruded into the executive function." Id., at 734. Because the Act contained contingency procedures for implementing the budget reductions in the event that the primary mechanism was invalidated, the Court rejected the suggestion that it should invalidate the 1921 removal provision rather than the Deficit Act's conferral of executive power in the Comptroller General. To do so would frustrate congressional intention and significantly alter the Comptroller General's office. Id., at 734–36.

[20] 478 U.S. at 726.

[21] Id. at 725 n. 4.

[22] 486 U.S. —, 108 S. Ct. 2597 (1988).

[23] Pub. L. 95–521, title VI, 92 Stat. 1867, as amended by Pub. L. 97–409, 96 Stat. 2039, and Pub. L. 100–191, 101 Stat. 1293, 28 U.S.C. §§ 49, 591 et seq.

moved at will and officials who can be protected through some form of good cause removal limits. "[B]ut our present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.' The analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II. *Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role. . . . At the other end of the spectrum from Myers, the characterization of the agencies in *Humphrey's Executor* and *Wiener as* 'quasi-legislative' or 'quasi-judicial' in large part reflected our judgment that it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will. We do not mean to suggest that an analysis of the functions served by the officials at issue is irrelevant. But the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." [24]

The Court discerned no compelling reason to find the good cause limit to interfere with the President's performance of his duties. The independent counsel did exercise executive, law-enforcement functions but the jurisdiction and tenure of each was limited in scope and policymaking or significant administrative authority was lacking. On the other hand, the removal authority did afford the President through the Attorney General power to ensure the "faithful execution" of the laws by assuring that the counsel is competently performing the statutory duties of the office.

It is now thus established that Congress may not involve itself in the removal of officials performing executive functions. It is also established that in creating offices in the executive branch and in creating independent agencies Congress has considerable discretion in statutorily limiting the power to remove of the President or another appointing authority. It is evident on the face of the opinion

[24] 108 S. Ct. at 2618-19.

that the discretion is not unbounded, that there are offices which may be essential to the President's performance of his constitutionally assigned powers and duties, so that limits on removal would be impermissible. There are no bright lines marking off one office from the other, but decision requires close analysis.

But as a result of these cases the long-running controversy with respect to the legitimacy of the independent agencies appears to have been settled,[25] although it appears likely that the controversies with respect to congressional-presidential assertions of power in executive agency matters is only beginning.

Private Access to Government Information

[P. 554, add to N.6:]

FTC v. *Grolier, Inc.*, 462 U.S. 19 (1983) (attorney work product); *Central Intelligence Agency* v. *Sims*, 471 U.S. 159 (1985) (matters specifically exempted by statute).

THE CONDUCT OF FOREIGN RELATIONS

Congressional Implementation of Presidential Policies

[P. 569, add to N.10:]

Regan v. *Wald*, 468 U.S. 222 (1984).

Recent Statements of the Political Question Doctrine

[P. 573, add to N.21:]

For example, a case involving "a purely legal question of statutory interpretation" is not a political question simply because the issues have significant political and foreign relations overtones. *Japan Whaling Ass'n* v. *American Cetacean Soc'y*, 478 U.S. 221, 229–30 (1986) (Fishermen's Protective Act does not completely remove Secretary of Commerce's discretion in certifying that foreign nationals are "diminishing the effectiveness of" an international agreement by taking whales in violation of quotas set pursuant to the agreement).

PRESIDENTIAL IMMUNITY FROM JUDICIAL DIRECTION

The President's Subordinates

[P. 601, add to N.24:]

Westfall v. *Erwin*, 484 U.S. —, 98 L.Ed.2d 619 (1988) (action must be discretionary in nature, as well as being within the scope of employment, before federal official is entitled to absolute immunity).

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[25] Indeed, the Court explicitly analogized the civil enforcement powers of the independent agencies to the prosecutorial powers wielded by the independent counsel. *Id.* at 2619 n.31.

[P. 601, add to N.25:]

See Mitchell v. *Forsyth*, 472 U.S. 511 (1985), extending qualified immunity to the Attorney General for authorizing a warrantless wiretap in a case involving domestic national security. Although the Court later held that such warrantless wiretaps violate the Fourth Amendment, at the time of the Attorney General's authorization this interpretation was not "clearly established," and the *Harlow* immunity protects officials exercising discretion on such open questions. The same standards were applied by the Court in extending qualified immunity to FBI agents who conducted a warrantless search; here, however, the open question was not a purely legal one, but rather whether the facts of the case fit clearly established probable cause and exigent circumstances exceptions to the warrant requirement. *Anderson* v. *Creighton*, 483 U.S. —, 97 L.Ed.2d 523 (1987).

ARTICLE III

Legislative Courts

Review of Legislative Courts by Supreme Court

[P. 625, add to N.13:]

D.C. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) (state or D.C. court's promulgation of rules governing admission to bar are administrative and not judicial in character, and review on constitutional grounds may be had in federal district court).

[P. 625, add to N. 14:]

D.C. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) (final order denying waiver of rules governing individual's bar admission is judicial in nature and reviewable only in the Supreme Court under 28 U.S.C. § 1257).

The "Public Rights" Distinction

[P. 626, add at end of section:]

In two recent cases the Court has continued to reject the public rights/private rights distinction as "a bright line test," and has instead focused on "substance"—i.e. on the extent to which the particular grant of jurisdiction to an Article I court threatens judicial integrity and separation of powers principles.[1] Nonetheless, the Court has indicated that the distinction may be an appropriate starting point for analysis. Thus, the fact that private rights traditionally at the core of Article III jurisdiction are at stake leads the Court to "searching" inquiry as to whether Congress is encroaching inordinately on judicial functions, while the concern is not so great where "public" rights are involved.[2]

Bankruptcy Courts

[P. 631, add at end of section:]

The Court's two recent decisions involving legislative courts suggest that the majority may now be closer to the balancing approach of the *Marathon* dissenters than to the position of the *Mar-*

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[1] *Thomas* v. *Union Carbide Agric. Products Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833 (1986).

[2] "In essence, the public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that 'could be conclusively determined by the Executive and Legislative Branches,' the danger of encroaching on the judicial powers is reduced." *Thomas* v. *Union Carbide Agric. Products Co.*, 473 U.S. 568, 589 (1985), quoting *Northern Pipeline*, 458 U.S. at 68 (plurality opinion).

athon plurality that Congress may confer judicial power on legislative courts in only very limited circumstances. In *Thomas* v. *Union Carbide Agric. Products Co.*,[3] the Court upheld a provision of the pesticide law requiring binding arbitration, with limited judicial review, of compensation due one registrant by another for mandatory sharing of registration information. And in *Commodity Futures Trading Comm'n* v. *Schor*,[4] the Court upheld conferral on the agency of authority, in a reparations adjudication under the Act, to also adjudicate "counterclaims" arising out of the same transaction. Neither the fact that the pesticide case involved a dispute between two private parties nor the fact that the CFTC was empowered to decide claims traditionally adjudicated under state law proved decisive to the Court's analysis.

In rejecting a "formalistic" approach and analyzing the "substance" of the provision at issue in *Union Carbide*, Justice O'Connor's opinion for the Court pointed to several considerations.[5] The right to compensation was not a purely private right, but "bears many of the characteristics of a 'public' right," since Congress was "authoriz[ing] an agency administering a complex regulatory scheme to allocate costs and benefits among voluntary participants in the program."[6] Also important was not "unduly constrict[ing] Congress in its ability to take needed and innovative action pursuant to its Article I powers;[7] arbitration was "a pragmatic solution to [a] difficult problem." The limited nature of judicial review was seen as a plus in the sense that "no unwilling defendant is subjected to judicial enforcement power"; on the other hand, availability of limited judicial review of the arbitrator's findings and determination for fraud, misconduct, or misrepresentation, and for due process violations, preserved the " 'appropriate exercise of the judicial function.' "[8] Thus, the Court concluded, Congress in exercise of Article I powers "may create a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."[9]

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[3] 473 U.S. 568 (1985).

[4] 478 U.S. 833 (1986).

[5] Contrast the Court's approach to Article III separation of powers issues with the more rigid approach enunciated in *INS* v. *Chadha* and *Bowsher* v. *Synar*, involving congressional incursions on executive power.

[6] 473 U.S. at 589.

[7] *CFTC* v. *Schor*, 478 U.S. at 851, summarizing the *Thomas* rule.

[8] 473 U.S. at 591, 592.

[9] 473 U.S. at 594.

In *Schor*, the Court described Art. III, § 1 as serving a dual purpose: to protect the role of an independent judiciary, and to safeguard the right of litigants to have claims decided by judges free from potential domination by the other branches of government. A litigant's Article III right is not absolute, the Court determined, but may be waived. This the litigant had done by objecting to the administrative law judge's jurisdiction only after adverse rulings on the merits. The threat to institutional integrity was "weighed" by reference to "a number of factors." The conferral on the CFTC of pendent jurisdiction over common law counterclaims was seen as more narrowly confined than was the grant to bankruptcy courts at issue in *Marathon*, and as more closely resembling the "model" approved in *Crowell* v. *Benson*. The CFTC's jurisdiction, unlike that of bankruptcy courts, was said to be confined to "a particularized area of the law"; the agency's orders were enforceable only by order of a district court,[10] and reviewable under a less deferential standard, with legal rulings being subject to *de novo* review; and the agency was not empowered, as had been the bankruptcy courts, to exercise "all ordinary powers of district courts."

ANCILLARY POWERS OF FEDERAL COURTS

The Contempt Power

— Categories of Contempt

[P. 637, add to N.5:]

See also Hicks v. *Feiock*, 485 U.S. —, 99 L.Ed.2d 721 (1988) (remanding to determine whether payment of child support arrearages would purge a determinate sentence, thereby signifying civil rather than criminal contempt, with the result that a burden-shifting mandatory presumption would not constitute a due process violation).

— An Inherent Power

[P. 640, add to text following N.20:]

This latter power includes authority to appoint private counsel to prosecute a criminal contempt.[11]

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[10] *Cf. Union Carbide, supra*, 473 U.S. at 591 (fact that "FIFRA arbitration scheme incorporates its own system of internal sanctions and relies only tangentially, if at all, on the Judicial Branch for enforcement" cited as lessening danger of encroachment on "Article III judicial powers").

[11] *Young* v. *United States ex rel. Vuitton*, 481 U.S. —, 95 L.Ed.2d 740 (1987) (holding, however, that the private counsel must be disinterested, and that consequently "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order").

Power to Issue Writs: The Act of 1789

[P. 649, line 4, add new note at end of paragraph:]

This proposition was recently asserted by the Court in *Pennsylvania Bureau of Correction* v. *United States Marshals Service*, 474 U.S. 34 (1985), holding that a federal district court lacked authority to order U.S. marshals to transport state prisoners, such authority not being granted by the relevant statutes.

— Habeas Corpus: Scope of the Writ

[P. 652, add new note following next-to-last sentence on page:]

28 U.S.C. § 2254(d) establishes a presumption of correctness, subject to exceptions, for state court determinations of factual issues evidenced by "reliable and adequate written indicia." *See Marshall* v. *Lonberger*, 459 U.S. 422 (1983).

[P. 657, add to N.2:]

The rules applicable to procedural defaults at trial also apply to defaults on appeal: a defendant must bear the risk of attorney error on appeal not amounting to ineffective assistance of counsel unless "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986). *See also Smith* v. *Murray*, 477 U.S. 527 (1986) (deliberate, tactical decision to abandon on appeal an issue raised by objection at trial was inadequate cause).

[P. 657, add to text following N.2:]

The Court has now found good cause to exist when an attorney failed to raise what at the time would have been a "novel" constitutional issue,[12] when evidence, not "readily discoverable," of intentional racial discrimination in the county's jury selection system came to light after trial,[13] and when an attorney's representation was so poor as to deprive the defendant of effective assistance of counsel.[14]

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[12] In *Reed* v. *Ross*, 468 U.S. 1, 16 (1984), the Court held that "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures."

[13] *Amadeo* v. *Zant*, 486 U.S. —, 100 L.Ed.2d 249 (1988).

[14] In *Strickland* v. *Washington*, 466 U.S. 668 (1984), the Court established a two-part test for collateral relief based on ineffective assistance: was the assistance reasonable, taking into account all of the circumstances of the case and according the attorney a high degree of deference, and was the defendant actually prejudiced by the deficiencies. The Court applied this test in several 1986 decisions, holding that the incompetency prong of the test had been met by an attorney's failure to conduct pretrial discovery and his resulting failure to file a motion to suppress evidence, *Kimmelman* v. *Morrison*, 477 U.S. 365 (1986); but that a tactical decision not to appeal an issue reserved by objection at trial fell far short of meeting the "rigorous standard." *Smith* v. *Murray*, 477 U.S. 527 (1986).

[P. 657, add to N.4:]

See also the opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor, suggesting that habeas relief to relitigate constitutional claims should not be available to prisoners "whose guilt is conceded or plain." *Kuhlman* v. *Wilson*, 477 U.S. 436, 452 (1986).

— Habeas Corpus: The Process of the Writ

[P. 659, add to N.17:]

However, under traditional standards governing stays of civil judgments, a release order may be stayed pending appeal. *Hilton* v. *Braunskill*, 481 U.S. —, 95 L.Ed.2d 724 (1987).

The Rule-Making Power and Powers Over Process

— Limitations

[P. 663, add to N.11:]

An appeals court's supervisory rule making appeal contingent upon a litigant's having filed with the district court timely objections to a master's report promotes the orderly administration of justice and does not deny to the litigant any Article III or due process right to have his claims litigated by an Article III judge. *Thomas* v. *Arn*, 474 U.S. 140 (1985).

— Appointment of Referees, Masters, and Special Aids

[P. 665, add to end of section:]

As long as the district court "has jurisdiction over [a] case at all times . . ., retain[ing] full authority to decide whether to refer a case to the magistrate, to review the magistrate's report, and to enter judgment," there is no Article III requirement that the court *sua sponte* review a magistrate's findings; the Federal Magistrate's Act's provision of *de novo* review for a party filing written objection to a magistrate's findings suffices for constitutional purposes.[15]

— Power to Admit and Disbar Attorneys

[P. 665, add to N.1:]

And see Frazier v. *Heebe*, 482 U.S. —, 96 L.Ed.2d 557 (1987) (district court rules governing admission held invalid by exercise of Supreme Court's supervisory authority).

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[15] *Thomas* v. *Arn*, 474 U.S. 140, 154 (1985) (also upholding a supervisory rule making appeal from the district court's judgment contingent upon timely objection to the magistrates's findings).

JUDICIAL POWER AND JURISDICTION—CASES AND CONTROVERSIES

Substantial Interest: Standing

— Constitutional Standards: Injury in Fact and Causation

[P. 677, add to N. 25:]

Heckler v. *Mathews*, 465 U.S. 728 (1984) (denial of equal treatment in conferral of benefits may be redressed by withdrawal of benefits to favored class, hence member of disfavored class may secure relief in the form of equal treatment even if extension of benefits is precluded by statute's severability clause). However, standing to assert such noneconomic stigmatic injury is available only to those personally denied equal treatment by the challenged policy. *Allen* v. *Wright*, 468 U.S. 737 (1984) (challenge by parents of minority schoolchildren to allegedly lax administration of IRS policy denying tax benefits to racially discriminatory private schools).

[P. 678, add to N.4:]

City of Los Angeles v. *Lyons*, 461 U.S. 95 (1983) (victim of police chokehold seeking injunctive relief unable to show sufficient likelihood of recurrence). *But cf. Meese* v. *Keene*, 481 U.S. —, 95 L.Ed.2d 415 (1987) (potential harm to reputation resulting from showing of film labeled by government as political propaganda constitutes more than "subjective chill").

[P. 678, add to N.5:]

In *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), the Court applied this principle on a remedy-by-remedy basis, holding that a plaintiff who clearly had standing to seek damages for injuries sustained as a result of a police chokehold did not have standing to seek injunctive relief against continuation of police policy authorizing use of chokeholds in situations not endangering arresting officers.

[P. 678, add to N.6:]

Similarly, the link between fully integrated public schools and allegedly lax administration of tax policy denying benefits to discriminatory private schools was deemed too tenuous, dependent as it is upon decisions by private school administrators and parents of children attending such schools. *Allen* v. *Wright*, 468 U.S. 737 (1984).

[P. 679, add to N.9:]

Arkansas Writers' Project, Inc. v. *Ragland*, 481 U.S. —, 95 L.Ed.2d 209 (1987) (magazine publisher may challenge underinclusive tax exemption benefitting other categories of publications).

— Prudential Standing Rules

[P. 680, add to N. 14:]

Clarke v. *Securities Industry Ass'n*, 479 U.S. 388 (1987).

— Standing to Assert the Constitutional Rights of Others

[P. 680, add to N.16:]

Conversely, one sued in his official capacity as a member of a governmental board has no individual right to appeal from a holding that the board chose not to appeal, absent unusual circumstances such as a unanimous consent requirement for such board appeals. *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986).

[P. 682, add to N.25:]

But see Secretary of State v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984) (one establishing injury in fact but whose First Amendment rights are not violated may challenge statute as overly broad without showing that persons whose rights are affected cannot bring a lawsuit: purpose of the rule is to benefit society by preventing the statute from "chilling the rights of other parties not before the court"); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. —, 98 L.Ed.2d 782 (1988) (booksellers may assert First Amendment rights of book buyers).

The Requirement of a Real Interest

— Mootness

[P. 697, add to N.15:]

Burke v. *Barnes*, 479 U.S. 361 (1987) (expiration of law).

[P. 700, add to N.10:]

But in *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983), the Court found no "exceptional circumstances" justifying application of the capable-of-repetition rule, pointing out that the plaintiff in that case had not made a "reasonable showing" that he personally would again be the victim of police illegality.

— Retroactivity versus Prospectivity

[P. 703, add to text following N.25:]

The Court has now adopted the former minority position, holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." [16]

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[16] *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). The case was decided by 6–3 vote; Justice Blackmun's opinion of the Court was joined by Justices Brennan, Marshall, Powell, Stevens, and Scalia; Chief Justice Rehnquist and Justice White filed dissents, the latter joined by Justice O'Connor as well the Chief Justice.

Political Questions

[P. 707, add to N.25:]

See also First Nat'l City Bank v. *Banco Para el Comercio de Cuba*, 462 U.S. 611 (1983) (courts may disregard the separate status of foreign corporate entities where effect would be to immunize foreign state from counterclaim).

JUDICIAL REVIEW

Limitations on the Exercise of Judicial Review

— Stare Decisis

[P. 725, add to text following N.25:]

The Court has continued to adhere to a stricter rule of *stare decisis* for statutory interpretation, on the theory that " 'it is more important that the applicable rule of law be settled than that it be settled right . . . , provided correction can be had by legislation.' " [17]

JURISDICTION OF SUPREME COURT AND INFERIOR FEDERAL COURTS

Cases Arising Under the Constitution, Laws, and Treaties of the United States

— When a Case Arises Under

[P. 728, add to N.16:]

For the current approach, *see Merrill Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), holding that a state negligence law claim based on a rebuttable presumption of negligence for violation of a federal regulatory statute does not arise under federal law for purposes of 28 U.S.C. § 1331 when the federal statute at issue creates no federal cause of action, express or implied.

[P. 730, add new paragraph following N.19:]

In an opinion for a unanimous Court, Chief Justice Burger has indicated that "Art. III 'arising under' jurisdiction is broader than federal-question jurisdiction under [28 U.S.C.] § 1331." [18] In that case the Court held that Congress in exercise of its Article I power to regulate foreign commerce may, within the bounds of Article III, define exceptions to the sovereign immunity of foreign states and

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[17] *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J. dissenting).

[18] *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).

thereby confer jurisdiction on federal courts to decide cases falling within the exceptions.[19]

— Federal Questions Resulting From Special Jurisdictional Grants

[P. 732, add to N.17 following *Carlson v. Green* citation:]

The Court has now drawn back as well in the constitutional tort area, the *Bivens* caution that no such action will be devised where "special factors counse[l] hesitation in the absence of affirmative action by Congress" (403 U.S. at 396) having nearly swallowed the rule. *See Chappell* v. *Wallace*, 462 U.S. 296 (1983) (no *Bivens* action for military personnel charging racial discrimination by superior officers); *Bush* v. *Lucas*, 462 U.S. 367 (1983) (no *Bivens* action for federal employees, since civil service laws are sufficiently elaborate and comprehensive); and *Schweiker* v. *Chilicki*, 487 U.S. —, 101 L.Ed.2d 370 (1988) (no *Bivens* action for alleged due process deprivations in denial of Social Security disability benefits, since Congress had provided no such statutory remedy and "Congress is the body charged with making the inevitable compromises required in the design of a massive and complex welfare benefits program").

[P. 732, add to N.17 following *City of Milwaukee* citation:]

Cf. County of Oneida v. *Oneida Indian Nation*, 470 U.S. 226, 236–40 (1985) (Non-intercourse Acts did not preempt common law actions Indian tribes may have had to enforce aboriginal land rights); and *National Farmers Union Ins. Cos.* v. *Crow Tribe*, 471 U.S. 845 (1985) (question whether an Indian tribe retains civil jurisdiction over non-Indian property owner must be answered by reference to federal law, and hence "arises under" for purposes of § 331).

— Civil Rights Act Jurisdiction

[P. 733, add to N.19:]

Compensatory damages must be based on injury to the plaintiff, and not on any abstract valuation of constitutional rights. *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299 (1986).

[P. 733, add to N.21:]

See also Felder v. *Casey*, 487 U.S. —, 101 L.Ed.2d 123 (1988) (state notice-of-claim statute, requiring notice and waiting period before bringing suit in state court under 42 U.S.C. § 1983, is preempted). Note as well that, although res judicata and collateral estoppel apply generally in § 1983 actions to bar relitigation of issues decided in state courts (*Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U.S. 75 (1984)), the Court has held that a guilty plea to a criminal offense, unaccompanied by Fourth Amendment challenge to admissibility of evidence, does not estop a § 1983 damage action based on an invalid search and seizure. *Haring* v. *Prosise*, 462 U.S. 306 (1983).

[P. 734, add to N.23:]

Also, the Court has recently held that punitive damages are awardable under § 1983 in an action against an individual. *Smith* v. *Wade*, 461 U.S. 30 (1983).

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[19] The Court distinguished cases holding that a mere jurisdictional grant statute may not constitute the federal law for "arising under" purposes. 461 U.S. at 495–96 (distinguishing *Mossman* v. *Higginson*, 4 Dall. 12 (1800); and *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443 (1852)).

[P. 734, add to N.25:]

Also, state officials sued in their individual capacities are entitled to qualified immunity from damages as long as their actions are not deemed to have been unreasonable as violative of clearly established federal statutory or constitutional rights, *Davis* v. *Scherer*, 468 U.S. 183 (1984). *Cf. Tower* v. *Glover*, 467 U.S. 914 (1984) (no qualified immunity for public defenders who conspire with state officials to deprive persons of rights); *Pulliam* v. *Allen*, 466 U.S. 522 (1984) (common law judicial immunity bars neither a § 1983 injunction action nor recovery of attorneys fees in such an action); *Forrester* v. *White*, 484 U.S. —, 98 L.Ed.2d 555 (1988) (no absolute immunity for state court judges from § 1983 damage actions relating to employment practices). However, actions against individuals found to have been acting in their official capacities will be deemed to be actions against the official state or subdivision entity represented. *Brandon* v. *Holt*, 469 U.S. 464 (1985). As for what actions may be attributed to official policy or practice, *see Oklahoma City* v. *Tuttle*, 471 U.S. 808 (1985) (single use of excessive force by police officer may not be), and *Pembaur* v. *City of Cincinnati*, 475 U.S. 469 (1986) (county prosecutor's instruction to deputy sheriffs to "go and get" witnesses may be).

[P. 734, add to text following N.1:]

Generally, it is state and not federal law that is applied to fill gaps in § 1983's coverage.[20]

[P. 734, add new section following "Civil Rights Act Jurisdiction":]

Limitation: State Sovereign Immunity

The Court's recent interpretations of the Eleventh Amendment and of the underlying principle of state sovereign immunity said to be reflected by the Amendment pose a significant limitation on general federal question jurisdiction. As the Court has put it, the Eleventh Amendment's "greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III." [21] While Congress may abrogate state sovereign immunity, at least in the civil rights area,[22] it may do so "only by making its intention unmistakably clear in the language of the statute." [23] Therefore, general language creating a cause of action against "any recipient" of federal assistance does not suffice to subject state recipients to suit, because "[a] general authorization for suit in federal court is not the kind of un-

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[20] In such circumstances, 42 U.S.C. § 1988 calls for application of "the common law, as modified . . . so far as [it] is not inconsistent with the Constitution and laws of the United States." *See, e.g., Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983) (tolling of statute of limitations is governed by state law). *But see Wilson* v. *Garcia*, 471 U.S. 261 (1985) (federal law governs the characterization of 1983 claims as personal injury actions for statute of limitations purposes).

[21] *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 98 (1984).

[22] *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976). This limitation was repeated in dictum in *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1983); and in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985).

[23] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985).

equivocal statutory language sufficient to abrogate the Eleventh Amendment." [24] Moreover, while States may waive sovereign immunity, this too must be "unequivocally expressed," [25] the Court now requiring not only a general waiver, but in addition an expression of "intention [by the State] to subject itself to suit in *federal court.*" [26] Under this latter rule, states which have totally abolished sovereign immunity for purposes of state law actions might still be extended immunity in federal court.[27]

— Pendent Jurisdiction

[P. 735, line 4, add note following "state law.":]

The strong interest of the Federal Arbitration Act in ensuring judicial enforcement of private agreements to arbitrate overrides the interest in judicial economy and the avoidance of bifurcated proceedings. *See Moses H. Cone Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983); and *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213 (1985).

Cases of Admiralty and Maritime Jurisdiction

— Admiralty and Maritime Cases

[P. 746, add to text following N.10:]

The Court has now expressed a willingness to "recogniz[e] products liability, including strict liability, as part of the general maritime law." [28]

— Admiralty and Federalism

[P. 753, add to N.6:]

In *Director, Office of Workers' Compensation Programs* v. *Perini*, 459 U.S. 297 (1983), the Court held that the 1972 amendments had not affected traditional coverage, so that there is no requirement that a barge employee injured upon the navigable waters establish that the employment had a direct or substantial relation to navigation or commerce.

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[24] *Id.* at 246 (1985).

[25] *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 99 (1983).

[26] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985) (emphasis original).

[27] See Justice Brennan's dissenting opinion in *Scanlon*, 473 U.S. at 247, 253 n.5. Note, however, that no such unequivocal waiver for state court actions was at issue, the Court characterizing the California provision as "simply authoriz[ing] the Legislature to waive the State's sovereign immunity." 473 U.S. at 241.

[28] *East River Steamship Corp.* v. *Transamerica Delaval*, 476 U.S. 858 (1986) (holding, however, that there is no products liability action in admiralty for purely economic injury to the product itself, unaccompanied by personal injury, and that such actions instead should be based on the contract law of warranty).

[P. 754, add to N.17:]

However, the Court held in *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207 (1986), that the Death on the High Seas Act is the exclusive wrongful death remedy in the case of OCS platform workers killed in a helicopter crash 35 miles off shore en route to shore from the platform.

Cases to Which the United States Is a Party

— Immunity of the United States From Suit

[P. 759, add to N.21:]

Waivers from immunity must be express. *See Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), holding that Civil Rights Act's provision that "the United States shall be liable for costs the same as a private person" was insufficient to waive immunity from awards of interest.

[P. 760, add to N. 24:]

See also Block v. *North Dakota*, 461 U.S. 273 (1983) (the rule that conditions on congressional waivers of sovereign immunity must be strictly construed takes precedence over conflicting rule that applicability of statute of limitations to State must be express).

Suits Between Two or More States

— Boundary Disputes

[P. 765, add to N.6:]

For recent boundary cases, see, e.g. *United States* v. *Maine* (*Rhode Island and New York Boundary Case*), 469 U.S. 504 (1985), holding that Long Island is an extension of the mainland and that Long Island Sound and part of Block Island Sound form a juridical bay constituting internal waters subject to state jurisdiction, but that Block Island is too far seaward to be part of the closing line of the bay; *United States* v. *Louisiana* (*Alabama and Mississippi Boundary Case*), 470 U.S. 93 (1985), holding that Mississippi Sound is a "historic bay" constituting inland waters; and *United States* v. *Maine*, 475 U.S. 89 (1986), holding that Nantucket Sound is not a historic bay, there being no evidence of "ancient title," and that consequently the entire sound is not within the inland waters of the State.

— Modern Types of Suits Between States

[P. 766, add to N.10:]

While the Court ordinarily retains jurisdiction in these cases to modify decrees on the basis of changed circumstances and equitable principles, the strong interest in finality of judgment prevents relitigation of factual determinations. *Arizona* v. *California*, 460 U.S. 605 (1983). See also *Nevada* v. *United States*, 463 U.S. 110 (1983) (*res judicata* prevents Federal Government and Indian tribe from relitigating allocation of river water established in an earlier case in which the Government represented both tribal interests and interests of reclamation project landowners). Nor will the Court exercise its equitable powers in a manner inconsistent with a congressionally approved interstate compact governing water allocation. *Texas* v. *New Mexico*, 462 U.S. 554 (1983).

[P. 766, add to text following N.10:]

The Court has indicated that similar equitable apportionment principles may be applied to protect a State's interest in anadromous fish.[29]

Controversies Between a State . . . and Foreign States

[P. 786, add to 2d N.4:]

The Supreme Court reversed, *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480 (1983), holding that Congress in the exercise of its foreign commerce power could define the extent of foreign sovereign immunity and at the same time, without violating Article III, vest federal courts with jurisdiction to decide cases arising under exceptions to that immunity spelled out in the Act.

THE ORIGINAL JURISDICTION OF THE SUPREME COURT

[P. 791, add to N.16:]

For an example of the Court's willingness to exercise its original jurisdiction in the absence of other avenues of redress for a State, *see South Carolina* v. *Regan*, 465 U.S. 367 (1984) (anti-injunction provision of Internal Revenue Code interpreted as barring injunction of tax assessments and collections only where aggrieved parties may later challenge the validity of the tax in a refund action).

FEDERAL-STATE COURT RELATIONS

Conflicts of Jurisdiction: Rules of Accommodation

— Abstention

[P. 809, add to N.3 after *Colorado River*:]

Arizona v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983).

[P. 809, add to end of N.3:]

Cf. Moses H. Cone Hosp. v. *Mercury Constr. Corp.*, 460 U.S. 1 (1983) (no such exceptional circumstances present, and fact that federal law governed the case militated against stay of federal court proceeding).

[P. 809, add to N.5 following citation to *Douglas v. Seacoast Products*:]

City of Houston v. *Hill*, 482 U.S. —, 96 L.Ed.2d 398 (1987) ("A federal court may not properly ask a state court if it would care in effect to rewrite a statute").

— Anti-Injunction Statute

[P. 812, add to N.25:]

D.C. Court of Appeals v. *Feldman*, 460 U.S. 462 (1983) (final order denying waiver of rules governing individual's bar admission is judicial in nature; promulgation of the bar rules is not).

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[29] *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017 (1983).

— Res Judicata

[P. 813, add to N.4:]

The *Allen* holding has been extended to § 1983 claims which could have been, but were not, raised in the state court action. *Migra* v. *Warren City School Dist. Bd. of Ed.*, 465 U.S. 75 (1984).

[P. 813, add to N.5:]

The "relitigation exception" to the Anti-Injunction Act, 28 U.S.C. § 2283, permitting a district court to stay state court proceedings in order to "protect or effectuate its judgments," operates only prior to state court judgment on the *res judicata* effect of a prior federal court judgment; full faith and credit must be extended to state court decisions on the merits of *res judicata*. *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518 (1986). Also, § 1738 requires initial reference to state preclusion law even if the federal law claim is within the exclusive jurisdiction of the federal courts. *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

[P. 813, add to N.6:]

Although § 1738 applies only to the preclusive effect of state court proceedings, under appropriate circumstances preclusive effect may also be given to unreviewed adjudicatory factfinding by state administrative agencies. *University of Tennessee* v. *Elliott*, 478 U.S. 788 (1986).

Conflicts of Jurisdiction: Federal Court Interference with State Courts

— Federal Restraint of State Courts by Injunctions

[P. 819, add new paragraph following N.7:]

In *Pennzoil Co.* v. *Texaco, Inc.*,[30] the Court did make it clear that *Younger* principles apply to civil proceedings in state courts. Comity requires abstention when states have "important" interests in pending civil proceedings, as long as litigants are not thereby precluded from asserting federal rights. Thus, the Court explained, "proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand."[31] And, while the Court cautioned that abstention would not necessarily be required in all cases where there are pending state proceedings, it held that enforcing civil monetary judgments through lien and bond requirements implicated the "important" State interest of "protecting 'the authority of the judicial system, so that its orders and judgments are not rendered nugatory.' "[32]

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[30] 481 U.S. —, 95 L.Ed.2d 1 (1987).
[31] 95 L.Ed.2d at 18.
[32] 95 L.Ed.2d at 17, n.12 (quoting *Juidice* v. *Vail*, 430 U.S. 327, 336 n.12).

— Habeas Corpus

[P. 821, add to N.18:]

Also, if the state has failed to raise an exhaustion defense at the district court level, the appeals court need not order dismissal of the habeas claims, but instead should determine whether interests of comity and judicial efficiency are better served by resolution on the merits or by dismissal. *Granberry* v. *Greer*, 481 U.S. —, 95 L.Ed.2d 119 (1987).

ARTICLE IV

JUDGMENTS: EFFECT TO BE GIVEN IN FORUM STATE

In General

[P. 837, add to N.6:]

Sun Oil Co. v. *Wortman*, 108 S. Ct. 2117 (1988) (forum state may apply its own statute of limitations to claims governed by the substantive law of another state). The fact that statutes of limitation are considered "substantive" for purposes of insuring uniformity with state law in federal diversity cases is not inconsistent with a "procedural" label for full faith and credit purposes, since "[t]he purpose of the Full Faith and Credit Clause . . . is not to establish uniformity but to delimit spheres of state legislative competence." *Id.* at 2124.

PRIVILEGES AND IMMUNITIES

Citizens of Each State

[P. 873, add to text following N.15:]

While the clause "was intended to create a national economic union," it protects non-economic interests as well.[1]

[P. 874, add new paragraph at end of section:]

A discrimination in favor of residents of a municipality implicates the clause even though the disfavored class consists of in-state as well as out-of-state residents. The Court determined in *United Building & Construction Trades Council* v. *Mayor of Camden* [2] that the clause is not to be read so literally as to exclude municipal residency classifications from its coverage. To rule otherwise, the Court concluded, would permit states to exclude out-of-state residents from benefits through the simple expediency of delegating the authority to political subdivisions. Moreover, in-state residents, unlike out-of-state residents, "at least have a chance to remedy at the polls any discrimination against them." [3]

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[1] *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985) (the right to practice law is an important economic interest but is also important for vindication of federal rights asserted in locally unpopular causes).

[2] 465 U.S. 208 (1984).

[3] 465 U.S. at 217. Justice Blackmun, the lone dissenter, thought the Clause should be limited to its literal meaning: "a State may not discriminate between its own residents and residents of other States on the basis of state citizenship." *Id.*, at 223, 224.

[P. 877, add to text following N.13:]

Employment on public contracts may also be considered a fundamental activity protected by the Clause,[4] as may the right to practice law.[5]

[P. 877, add to N. 14:]

In *United Building & Construction Trades Council* v. *Mayor of Camden*, 465 U.S. 208 (1984), the Court remanded for consideration under this test of whether the municipality could adequately justify its requirement that at least 40% of contractors on city construction projects be city residents. *See also Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985) (State had not justified exclusion of residents from practice of law); *Supreme Court of Virginia* v. *Friedman*, 487 U.S. —, 101 L.Ed.2d 56 (1988) (State did not justify residency requirement for bar admission on motion without taking bar examination).

INTERSTATE RENDITION

Duty to Surrender Fugitives From Justice

[P. 882, add to text following N.6:]

And in 1987, the Supreme Court overruled this aspect of *Kentucky* v. *Dennison*, holding that the duty to deliver fugitives may be enforced against state officials in federal courts.[6]

[P. 883, add to N.22:]

California v. *Superior Court*, 482 U.S. —, 96 L.Ed.2d 332 (1987) (under the Extradition Act, extradition is a "summary procedure").

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[4] *United Building & Construction Trades Council* v. *Mayor of Camden*, 465 U.S. 208 (1984). Thus Commerce Clause analysis, including the market regulator/market participant distinction, is not controlling. "It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce." *Id.*, at 220.

[5] *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985). This is both because "the practice of law is important to the national economy," and because out-of-state lawyers can perform functions, e.g. representing "persons who raise unpopular federal claims," important to the national union of states. *Id.*, at 281. On the other hand, lawyers are not "officers" of the state in any political sense justifying a restriction to residents. *Id.*, at 283.

[6] *Puerto Rico* v. *Branstad*, 483 U.S. —, 97 L.Ed.2d 187 (1987) (not deciding, however, whether Puerto Rico is a "State" for purposes of the Extradition Clause, since the Extradition Act required rendition in any event).

DOCTRINE OF THE EQUALITY OF STATES

Property Rights of States to Soil Under Navigable Waters

[P. 888, add to text following sentence containing N.2:]

The rule applies not only to lands beneath waters that are navigable in fact, but also to lands beneath waters subject to ebb and flow of the tides.[7]

[P. 889, add to text following N.10:]

There is a strong presumption against Congress having acted during territorial status, by conveyance or reservation, to defeat passage at statehood of title to land beneath navigable waters.[8]

PROPERTY AND TERRITORY: POWERS OF CONGRESS

Public Lands: Federal and State Powers Thereover

[P. 891, add to text following N.11:]

Absent action by Congress, however, states may exercise some jurisdiction over activities on federal lands.[9]

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[7] *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. —, 98 L.Ed.2d 877 (1988).

[8] *See Utah Div. of State Lands* v. *United States*, 482 U.S. —, 96 L.Ed.2d 162 (1987) (even if Congress had included lake bed in reservation made during territorial status, title passed to state at statehood because Congress did not "clearly express" intent to defeat state's claim; Court also strained to conclude that lake bed had not been included in reservation).

[9] *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U.S. —, 94 L.Ed.2d 577 (1987).

ARTICLE VI

NATIONAL SUPREMACY

Supremacy Clause Versus the Tenth Amendment

[P. 925, add new paragraph at end of section:]

The Court overruled *National League of Cities in Garcia* v. *San Antonio Metropolitan Transit Auth.*,[1] and seemingly returned to the conception of federal supremacy embodied in *Wirtz* and *Fry*. For the most part, the Court indicated, states must seek protection from the impact of federal regulation in the political processes, and not in any limitations built in to the commerce power. Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren." [2] State autonomy is both limited and protected by the terms of the Constitution itself, hence—ordinarily, at least—exercise of Congress' enumerated powers is not to be limited by "*a priori* definitions of state sovereignty." [3] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." [4] There are direct limitations in Art. I, § 10, and "Section 8 . . . works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation." [5] On the other hand, the principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment, in the Commerce Clause itself, or in "judicially created limitations on federal power," but in the structure of the Federal Government and in the political processes.[6] "[T]he funda-

[1] 469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection. Justice Blackmun's opinion of the Court was joined by Justices Brennan, White, Marshall, and Stevens. Writing in dissent were Justices Powell (joined by Chief Justice Burger and by Justices Rehnquist and O'Connor), O'Connor (joined by Justices Powell and Rehnquist), and Rehnquist.

[2] 469 U.S. at 557.

[3] 469 U.S. at 548.

[4] 469 U.S. at 549.

[5] 469 U.S. at 548.

[6] "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Feder-

mental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." [7] While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits." [8] Thus, arguably, the Court has not totally abandoned the *National League of Cities* premise that there are limits on the extent to which federal regulation may burden states as states. Rather, it has stipulated that any such limits on exercise of federal power must be premised on a failure of the political processes to protect state interests, and "must be tailored to compensate for [such] failings . . . rather than to dictate a 'sacred province of state autonomy.'" [9]

Further indication of what must be alleged in order to establish affirmative limits to commerce power regulation was provided in *South Carolina* v. *Baker*.[10] The Court expansively interpreted Garcia as meaning that there must be an allegation of "some extraordinary defects in the national political process" before the Court will intervene. A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." [11] Thus, the general rule is that "limits on Congress' authority to regulate state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." [12]

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al Government itself." 469 U.S. at 550. The Court cited as prime examples the role of states in selecting the President, and the equal representation of states in the Senate. *Id.*, at 551.

[7] 469 U.S. at 554.

[8] 469 U.S. at 556.

[9] *Id.*, at 554.

[10] 485 U.S. —, 99 L.Ed.2d 592 (1988).

[11] 99 L.Ed.2d at 603.

[12] *Id.* at 602.

The Doctrine of Federal Exemption From State Taxation

— Applicability of Doctrine to Federal Securities

[P. 929, add new note to end of sentence ending on line 1:]

Similarly, a state tax including in an investor's net assets the value of government-backed securities ("Ginnie Maes") is valid, since it would have no adverse effect on the Federal Government's borrowing ability. *Rockford Life Ins. Co.* v. *Illinois Dep't of Revenue*, 482 U.S. —, 96 L.Ed.2d 152 (1987).

[P. 929, add to N.13:]

See also *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855 (1983) (State property tax on bank shares, computed on the basis of a bank's net assets without any deduction for value of United States obligations held by the bank, conflicts with Rev. Stat. § 3701 (31 U.S.C. § 3124); and *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983) (State tax on net earnings of banks, applied to interest earned on obligations of the United States, violates 31 U.S.C. § 3124; the tax is not excused as "nondiscriminatory," since interest earned on state obligations is excepted). *Cf. First National Bank* v. *Bartow County Bd. of Tax Assessors*, 470 U.S. 583 (1985) (§ 3124 provides an exemption no broader than that which the Constitution requires; State property tax on bank shares may include a pro rata method for allocating a fair share of federal government obligations to bank liabilities).

— Taxation of Government Contractors

[P. 931, add to N.3:]

South Carolina v. *Baker*, 485 U.S. —, 99 L.Ed.2d 592, 610 (1988).

OATH OF OFFICE

National Duties of State Officers

[P. 942, add new paragraph to end of section:]

Kentucky v. *Dennison* was overruled in 1987, the Court declaring that "[i]t has long been a settled principle that federal courts may enjoin unconstitutional action by state officials," and that "[t]he fundamental premise of the holding in *Dennison*—'that the States and the Federal Government in all circumstances must be viewed as coequal sovereigns—is not representative of the law today.' " [13]

[13] *Puerto Rico* v. *Branstad*, 483 U.S. —, 97 L.Ed.2d 187, 195–96 (1987) (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982)).

FIRST AMENDMENT

RELIGION

Court Tests Applied to Legislation Affecting Religion

[P. 966, add to N.14:]

Similar observations were repeated by the Chief Justice in his opinion for the Court in *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) (the metaphor is not "wholly accurate"; the Constitution does not "require complete separation of church and state [but] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

[P. 967, add to N.19:]

Justice Scalia, joined by Chief Justice Rehnquist, has advocated abandonment of the purpose test. *Edwards* v. *Aguillard*, 482 U.S. —, 96 L.Ed.2d 510, 553-56 (1987).

[P. 967, add to N.21:]

And note that the tests were not applied at all in *Marsh* v. *Chambers*, 463 U.S. 783 (1983), in which the Court relied instead on historical evidence suggesting that legislative prayers were not considered by the framers of the First Amendment to offend the Establishment Clause.

ESTABLISHMENT OF RELIGION

Financial Assistance to Church-Related Institutions

[P. 974, add to end of N.17:]

But see Mueller v. *Allen*, 463 U.S. 388 (1983), in which the views of the first group noted above controlled.

[P. 976, add new paragraph following N.2:]

The Court in two 1986 cases again struck down programs of public subsidy of instructional services provided on the premises of sectarian schools, and relied on the effects test as well as the entanglement test. In *Grand Rapids School District* v. *Ball*,[1] the Court invalidated two programs conducted in leased private school classrooms, one taught during the regular school day by public school teachers,[2] and the other taught after regular school hours by part-time "public" teachers otherwise employed as full-time teachers by the sectarian school.[3] Both programs, the Court held,

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[1] 473 U.S. 373 (1985).

[2] The vote on this "Shared Time" program was 5-4, the opinion of the Court by Justice Brennan being joined by Justices Marshall, Blackmun, Powell, and Stevens. The Chief Justice, and Justices White, Rehnquist, and O'Connor dissented.

[3] The vote on this "Community Education" program was 7-2, Chief Justice Burger and Justice O'Connor concurring with the "Shared Time" majority.

had the effect of promoting religion in three distinct ways. The teachers might be influenced by the "pervasively sectarian nature" of the environment and might "subtly or overtly indoctrinate the students in particular religious tenets at public expense"; use of the parochial school classrooms "threatens to convey a message of state support for religion" through "the symbolic union of government and religion in one sectarian enterprise"; and "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." [4] In *Aguilar* v. *Felton*,[5] the Court invalidated a program under which public school employees provided instructional services on parochial school premises to educationally deprived children. The program differed from those at issue in *Grand Rapids* because the classes were closely monitored for religious content. This "pervasive monitoring" did not save the program, however, because, by requiring close cooperation and day-to-day contact between public and secular authorities, the monitoring "infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement." [6]

[P. 977, add to N.7:]

The *Allen* presumption of neutrality was extended to other situations in *Mueller* v. *Allen*, 463 U.S. 388 (1983), upholding tax deductions for tuition and other school expenses; Justice Rehnquist wrote the Court's opinion, joined by Chief Justice Burger, and by Justices White, Powell, and O'Connor. The *Wolman* view of *Allen* as an exception to be narrowly limited was repeated in Justice Marshall's dissent in *Mueller*, joined by Justices Brennan, Blackmun, and Stevens.

[P. 979, add to N.13:]

But cf. Lynch v. *Donnelly*, 465 U.S. 668, 673 (1984) (due to Free Exercise Clause, Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions").

[P. 979, add new paragraph to text following N.14:]

The *Nyquist* holding was substantially undermined in *Mueller* v. *Allen*.[7] In *Mueller* the Court upheld a Minnesota deduction from state income tax available to parents of elementary and secondary school children for expenses incurred in providing tuition, transportation, textbooks, and various other school supplies. Because the

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[4] 473 U.S. at 397.

[5] 473 U.S. 402 (1985). This was another 5–4 decision, with Justice Brennan's opinion of the Court being joined by Justices Marshall, Blackmun, Powell, and Stevens, and with Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissenting.

[6] 473 U.S. at 413.

[7] 463 U.S. 388 (1983).

Minnesota deduction was available to parents of public and private schoolchildren alike, the Court termed it "vitally different from the scheme struck down in *Nyquist*," and more similar to the benefits upheld in *Everson* and *Allen* as available to *all* schoolchildren.[8] The Court declined to look behind the "facial neutrality" of the law and consider empirical evidence of its actual impact, citing a need for "certainty" and the lack of "principled standards" by which to evaluate such evidence.[9] However, "[m]ore fundamental" to the Court's refusal to consider the alleged disproportionate benefits to parents of parochial schools was the assertion that, "whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits . . . provided to the State and all taxpayers by parents sending their children to parochial schools." [10] Thus *Mueller* seemingly stands for the proposition that state subsidies of tuition expenses at sectarian schools are permissible if contained in a facially neutral scheme providing benefits, at least nominally, to parents of public and private schoolchildren alike.[11]

A second factor important in *Mueller*, present but not controlling in *Nyquist*, was that the financial aid was provided to the parents of schoolchildren rather than to the school, and thus in the Court's view was "attenuated" rather than direct. The Court noted that, with the exception of *Nyquist*, "all . . . of our recent cases invalidating state aid to parochial schools have involved the direct

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[8] 463 U.S. at 398.

[9] 463 U.S. at 401. Justice Marshall's dissenting opinion, joined by Justices Brennan, Blackmun, and Stevens, argued that the tuition component of the deduction, unavailable to parents of most public schoolchildren, was by far the most significant, and that the deduction as a whole "was little more that a subsidy of tuition masquerading as a subsidy of general educational expenses." 463 U.S. at 408–09. *Cf. Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985), where the Court emphasized that 40 of 41 nonpublic schools at which publicly funded programs operated were sectarian in nature; *Widmar* v. *Vincent*, 454 U.S. 263, 275 (1981), holding that a college's open forum policy had no primary effect of advancing religion "[a]t least in the absence of evidence that religious groups will dominate [the] forum;" and *Bowen* v. *Kendrick*, 487 U.S. —, 108 S. Ct. 2562, 101 L.Ed.2d 520 (1988), permitting religious institutions to be recipients under a "facially neutral" direct grant program.

[10] 463 U.S. at 402.

[11] See also *Witters* v. *Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), in which the Court held that provision of vocational assistance for the blind to a student who used the aid for tuition at a sectarian college did not have a primary effect of advancing religion. Without citing *Mueller*, the Court relied on the fact that the aid is paid directly to the student for use at the institution of his or her choice, so that religious institutions received aid "only as a result of the genuinely independent and private choices of aid recipients," and on the additional fact that there was nothing in the record to indicate that "any significant portion of the aid" from the program as a whole would go to religious education. 474 U.S. at 487, 488.

transmission of assistance from the State to the schools themselves." [12]

[P. 981, add to N.22:]

In *Witters* v. *Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986), the Court upheld use of a vocational rehabilitation scholarship at a religious college, emphasizing that the religious institution received the public money as a result of the "genuinely independent and private choices of the aid recipients," and not as the result of any decision by the State to sponsor or subsidize religion.

[P. 981, add new paragraph to end of section:]

In *Bowen* v. *Kendrick* [13] the Court by a 5–4 vote upheld the Adolescent Family Life Act (AFLA) [14] against facial challenge. The Act permits direct grants to religious organizations for provision of health care and for counseling of adolescents on matters of pregnancy prevention and abortion alternatives, and requires grantees to involve other community groups, including religious organizations, in delivery of services. All of the Justices agreed that AFLA had valid secular purposes; their disagreement related to application of the effects and entanglement tests. The Court relied on analogy to the higher education cases rather than the cases involving aid to elementary and secondary schools.[15] The case presented conflicting factual considerations. On the one hand, the class of beneficiaries was broad, with religious groups not predominant among the wide range of eligible community organizations. On the other hand, there were analogies to the parochial school aid cases: secular and religious teachings might easily be mixed, and the age of the targeted group (adolescents) suggested susceptibility. The Court resolved these conflicts by holding that AFLA is facially valid, there being insufficient indication that a significant proportion of the AFLA funds would be disbursed to "pervasively sectarian" institutions, but by remanding to the district court to determine whether particular grants to pervasively sectarian institutions were invalid. As the Court emphasized in both parts of its opinion, the fact that "views espoused [during counseling] on matters of premarital sex, abortion, and the like happen to coincide

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[12] 462 U.S. at 399.

[13] 487 U.S. —, 108 S. Ct. 2562, 101 L.Ed.2d 520 (1988). Chief Justice Rehnquist wrote the Court's opinion, and was joined by Justices White, O'Connor, Scalia, and Kennedy; in addition, Justice O'Connor and Justice Kennedy, joined by Justice Scalia, filed separate concurring opinions. Justice Blackmun's dissenting opinion was joined by Justices Brennan, Marshall, and Stevens.

[14] Pub. L. 97-35, 95 Stat. 578 (1981), codified at 42 U.S.C. § 300z *et seq.*

[15] The Court also noted that the 1899 case of *Bradfield* v. *Roberts* had established that religious organizations may receive direct aid for support of secular social-welfare cases.

with the religious views of the AFLA grantee would not be sufficient to show [an Establishment Clause violation]." [16]

Although the Court applied the *Lemon* three-part test in *Kendrick*, the case may signal a changing approach to direct aid cases. The distinction between facial and as-applied invalidity is new in this context, and may have implications for other Establishment Clause challenges. Also noteworthy is the fact that the Court expressed tolerance for a level of monitoring that would be impermissible for "pervasively sectarian" organizations, rejecting the "'Catch-22' argument" that excessive entanglement would result. Perhaps most significant is the fact that Justice Kennedy indicated in his separate concurring opinion that he would look behind the "pervasively sectarian" nature of aid recipients and focus on how aid money is actually being spent; only if aid is being spent for religious purposes would he hold that there has been a violation.[17] This apparent contrast with Justice Powell's approach suggests that there now may be five votes favoring a less restrictive approach in the parochial school aid context.

Governmental Encouragement in Schools: Prayers

[P. 985, add new paragraphs at end of section:]

In *Wallace* v. *Jaffree*,[18] the Court held invalid an Alabama statute authorizing a 1-minute period of silence in all public schools "for meditation or prayer." Because the only evidence in the record indicated that the words "or prayer" had been added to the existing statute by amendment for the sole purpose of returning voluntary prayer to the public schools, the Court found that the first prong of the tripartite test had been violated, i.e. that the statute was invalid as being entirely motivated by a purpose of advancing religion. The Court characterized the legislative intent to return prayer to the public schools as "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday," [19] and both Justices Powell and O'Connor in concurring opinions suggested that other state statutes authorizing moments of silence might pass constitutional muster.[20]

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[16] 101 L.Ed.2d at 549.

[17] Id. at 551.

[18] 472 U.S. 38 (1985).

[19] *Id.* at 59.

[20] Justice O'Connor's concurring opinion is notable for its effort to synthesize and refine the Court's Establishment and Free Exercise tests (*see also* the Justice's concurring opinion in *Lynch* v. *Donnelly*), and Justice Rehnquist's dissent for its effort to redirect Establishment Clause analysis by abandoning the tripartite test,

The Court, relying mainly on historical practice, has held that the opening of a state legislative session with a prayer by a state-paid chaplain does not offend the Establishment Clause, distinguishing *Abington* on the basis that state legislators, as adults, are "presumably not readily susceptible to 'religious indoctrination' or 'peer pressure.'" [21]

Governmental Encouragement of Religion in Public Schools: Curriculum Restriction

[P. 985, add to text at end of section:]

Similarly invalidated as having the improper purpose of advancing religion was a Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools. "The preeminent purpose of the Louisiana legislature," the Court found in *Edwards* v. *Aguillard*, "was clearly to advance the religious viewpoint that a supernatural being created human kind." [22] The Court viewed as a "sham" the stated purpose of protecting academic freedom, and concluded instead that the legislature's purpose was to narrow the science curriculum in order to discredit evolution "by counterbalancing its teaching at every turn with the teaching of creation science." [23]

[P. 987, add new section before "Sunday Closing Laws":]

Exemption of Religious Organizations from Generally Applicable Laws

The Civil Rights Act's exemption of religious organizations from the prohibition against religious discrimination in employment [24] does not violate the Establishment Clause when applied to a religious organization's secular, nonprofit activities. The Court held in *Corporation of the Presiding Bishop* v. *Amos* [25] that a

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discarding any requirement that government be neutral between religion and "irreligion," and confining the scope to a prohibition on establishing a national church or otherwise favoring one religious group over another.

[21] *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983).

[22] 483 U.S. —, 96 L.Ed.2d 510, 524 (1987).

[23] 96 L.Ed.2d at 523. The Court's conclusion was premised on its finding that "the term 'creation science,' as used by the legislature . . . embodies the religious belief that a supernatural creator was responsible for the creation of humankind." *Id.*, at 524.

[24] Section 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2, makes it unlawful for any employer to discriminate in employment practices on the basis of an employee's religion. Section 702, 42 U.S.C. § 2000e–1, exempts from the prohibition "a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation . . . of its activities."

[25] 483 U.S. —, 97 L.Ed.2d 273 (1987).

church-run gymnasium operated as a nonprofit facility open to the public could require that its employees be church members. Declaring that "there is ample room for accommodation of religion under the Establishment Clause," [26] the Court identified a legitimate purpose in freeing a religious organization from the burden of predicting which of its activities a court will consider to be secular and which religious. The rule applying across-the-board to nonprofit activities and thereby "avoid[ing] . . . intrusive inquiry into religious belief" also serves to lessen entanglement of church and state.[27] The exemption itself does not have a principal effect of advancing religion, the Court concluded, but merely allows churches to advance religion.[28]

Sunday Closing Laws

[P. 988, add to text following N.24:]

A state statute mandating that employers honor the Sabbath day of the employee's choice was held invalid as having the primary effect of promoting religion by weighting the employee's Sabbath choice over all other interests.[29]

[P. 989, add two new sections at end of Establishment Clause:]

Religion in Governmental Observances

The practice of opening legislative sessions with prayers by paid chaplains was upheld in *Marsh* v. *Chambers*,[30] a case involving prayers in the Nebraska Legislature. The Court relied almost entirely on historical practice. Congress had paid a chaplain and opened sessions with prayers for almost 200 years; the fact that Congress had continued the practice after considering constitutional objections in the Court's view strengthened rather than weakened the historical argument. Similarly, the practice was well rooted in Nebraska and in most other states. Most importantly, the

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[26] 97 L.Ed.2d at 284.

[27] *Id.* at 285.

[28] "For a law to have forbidden 'effects' . . . it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 97 L.Ed.2d at 283. Justice O'Connor's concurring opinion suggests that practically any benefit to religion can be "recharacterized as simply 'allowing' a religion to better advance itself," and that a "necessary second step is to separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." 97 L.Ed.2d at 289, 290.

[29] *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985).

[30] 463 U.S. 783 (1983). *Marsh* was a 6-3 decision, with Chief Justice Burger's opinion for the Court being joined by Justices White, Blackmun, Powell, Rehnquist, and O'Connor, and with Justices Brennan, Marshall, and Stevens dissenting.

First Amendment had been drafted in the First Congress with an awareness of the chaplaincy practice, and this practice was not prohibited or discontinued. The Court did not address the lower court's findings,[31] amplified in Justice Brennan's dissent, that each aspect of the Establishment Clause tripartite test had been violated. Instead of constituting an application of the tests, therefore, *Marsh* can be read as representing an exception to their application.[32]

A different form of governmentally sanctioned religious observance was subjected to the three-part test in *Lynch* v. *Donnelly*,[33] in which the Court upheld inclusion of a Nativity scene (creche) in a city's Christmas display. To begin with, however, Chief Justice Burger's opinion for the Court expanded on the religious heritage theme exemplified by *Marsh;* other evidence that " '[w]e are a religious people whose institutions presuppose a Supreme Being' " [34] was supplied by reference to the national motto "In God We Trust," the affirmation "one nation under God" in the pledge of allegiance, and the recognition of both Thanksgiving and Christmas as national holidays. Against that background, the Court then determined that the city's inclusion of the creche in its Christmas display had a legitimate secular purpose in recognizing "the historical origins of this traditional event long [celebrated] as a National Holiday," [35] and that its primary effect was not to advance religion. The benefit to religion was called "indirect, remote, and incidental," and in any event no greater than the benefit resulting from other actions that had been found to be permissible, e.g. the provision of transportation and textbooks to parochial school students, various assistance to church-supported colleges, Sunday closing laws, and legislative prayers.[36] The Court also reversed the lower

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[31] *Chambers* v. *Marsh*, 675 F.2d 228 (8th Cir. 1982).

[32] School prayer cases were distinguished on the basis that legislators, as adults, are presumably less susceptible than are schoolchildren to religious indoctrination and peer pressure, 463 U.S. at 792, but there was no discussion of the tests *per se*.

[33] 465 U.S. 668 (1984). *Lynch* was a 5–4 decision, with Justice Blackmun, who voted with the majority in *Marsh* joining the *Marsh* dissenters in this case. Again, Chief Justice Burger wrote the opinion of the Court, joined by the other majority Justices, and again Justice Brennan wrote a dissent, joined by the other dissenters. A concurring opinion was added by Justice O'Connor, and a dissenting opinion was added by Justice Blackmun.

[34] 465 U.S. at 675, quoting *Zorach* v. *Clausen*, 343 U.S. 306, 313 (1952).

[35] 465 U.S. at 680.

[36] 465 U.S. at 681–82. Note that, while the extent of benefit to religion was an important factor in earlier cases, it was usually balanced against the secular effect of the same practice rather than the religious effects of other practices.

court's finding of entanglement based only on "political divisiveness." [37] The future import of the Court's emphasis on the nation's religious heritage is unclear, due to the 5–4 vote and the fact that Justice O'Connor, although she joined in the Court's opinion, in her own concurring opinion expanded on the reasons why the Christmas display might validly be considered not to have the purpose or effect of endorsing religion.[38]

Miscellaneous

In *Larkin* v. *Grendel's Den*,[39] the Court had occasion to hold that the Establishment Clause is violated by a delegation of governmental decisionmaking to churches. At issue was a state statute permitting any church or school to block issuance of a liquor license to any establishment located within 500 feet of the church or school. While the statute had a permissible secular purpose of protecting churches and schools from the disruptions often associated with liquor establishments, the Court indicated that these purposes could be accomplished by other means, e.g. an outright ban on liquor outlets within a prescribed distance, or the vesting of discretionary authority in a governmental decisionmaker required to consider the views of affected parties. However, the conferral of a veto authority on churches had a primary effect of advancing religion both because the delegation was standardless (thereby permitting a church to exercise the power to promote parochial interests), and because "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some." [40] Moreover, the Court determined, because the veto "enmeshes churches in the processes of government," it represented an entanglement offensive to the "core rationale underlying the Establishment Clause"—"[to prevent] 'a fusion of governmental and religious functions.' " [41]

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[37] 465 U.S. at 683–84.

[38] The Court in its 1984 term had the opportunity to apply *Lynch* to a situation in which a city-sponsored Nativity scene was not part of a larger Christmas display, but merely affirmed by equally divided vote (Justice Powell not participating) the lower court's decision upholding the display on the basis of *Lynch* and *Widmar* v. *Vincent. Board of Trustees of the Village of Scarsdale* v. *McCreary*, 471 U.S. 83 (1985), aff'g 739 F.2d 716 (2d Cir. 1984).

[39] 459 U.S. 116 (1982).

[40] 459 U.S. at 125–26. *But cf. Marsh* v. *Chambers*, 463 U.S. 783 (1983), involving no explicit consideration of the possible symbolic implication of opening legislative sessions with prayers by paid chaplains.

[41] 459 U.S. at 126–27, quoting *Abington*, 374 U.S. 203, 222.

FREE EXERCISE OF RELIGION

Court Standards: The Belief-Conduct Distinction [P. 990 , add to text following N.8:]

Conversely, government need not conduct its own affairs in a manner comporting with the religious beliefs of citizens.[42]

[P. 991, add to end of section:]

The compelling interest test is not uniformly applied, however, whenever religiously motivated conduct is affected by governmental action. The nature of the governmental action and its effect on religious exercise must also be considered. Emphasizing the absence of coercion on religious adherents rather than the belief/conduct dichotomy, the Court in *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*[43] held that the Forest Service, even absent a compelling justification, could construct a road through a portion of a national forest held sacred and used by Indians in religious observances. The Court distinguished between governmental actions having the indirect effect of frustrating religious practices and those actually prohibiting religious belief or conduct: " 'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' "[44] Similarly, even a sincerely held religious belief that assignment of a social security number would rob a child of her soul was held insufficient to bar the government from using the number for purposes of its own recordkeeping.[45]

Exemption from General Governmental Requirements

[P. 997, add to text following N.15:]

Sherbert and *Thomas* were followed in a 1987 case, the fact that the employee's religious conversion rather than a job reassignment had created the conflict between work and Sabbath that had resulted in discharge not being considered material to the determi-

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[42] *Bowen* v. *Roy*, 476 U.S. 693 (1986) (Government may use Social Security number to identify Native American whose religious beliefs are thereby offended); *Lyng* v. *Northwest Indian Cemetery Ass'n*, 485 U.S. —, 99 L.Ed.2d 534 (1988) (Forest Service may build road on public land held sacred by Native Americans even though government's action may destroy the Indians' ability to practice their religion).

[43] 485 U.S. —, 99 L.Ed.2d 534 (1988).

[44] 99 L.Ed.2d at 548, quoting *Sherbert* v. *Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

[45] *Bowen* v. *Roy*, 476 U.S. 693 (1986).

nation that free exercise rights had been burdened by the denial of unemployment compensation.[46]

[P. 998, add new paragraphs following N.21:]

"A compelling governmental interest" was found to outweigh free exercise interests in *Bob Jones Univ.* v. *United States*,[47] in which the Court upheld the I.R.S.'s denial of tax exemptions to church-run colleges whose racially discriminatory admissions policies derived form religious beliefs. The Federal Government's "fundamental, overriding interest in eradicating racial discrimination in education"—found to be encompassed in common law standards of "charity" underlying conferral of the tax exemption on "charitable" institutions—"substantially outweighs" the burden on free exercise. Nor could the schools' free exercise interests be accommodated by less restrictive means.[48] On the other hand, no compelling governmental interest need be shown if the asserted burden on free exercise is found by the Court to be negligible or illusory.[49]

The Court has held the *Sherbert* test to be wholly inapplicable in the context of military rules and regulations, where First Amendment review "is far more deferential than . . . review of similar laws or regulations designed for civilian society."[50] Thus the Court did not question the decision of military authorities to apply uniform dress code standards to prohibit the wearing of a yarmulke by an officer compelled by his Orthodox Jewish religious beliefs to wear the yarmulke.

Similarly, a high degree of deference is due decisions of prison administrators having the effect of restricting religious exercise by inmates. The general rule is that prison regulations impinging on exercise of constitutional rights by inmates are " 'valid if . . . reasonably related to legitimate penological interests.' "[51] Thus because general prison rules requiring a particular category of inmates to work outside of buildings where religious services were held, and prohibiting return to the buildings during the work day, could be viewed as reasonably related to legitimate penological con-

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[46] *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987).

[47] 461 U.S. 574 (1983).

[48] 461 U.S. at 604.

[49] *Tony and Susan Alamo Found.* v. *Secretary of Labor*, 471 U.S. 290 (1985) (the Court failing to perceive how application of minimum wage and overtime requirements would burden free exercise rights of employees of a religious foundation, there being no assertion that the *amount* of compensation was a matter of religious import).

[50] *Goldman* v. *Weinberger*, 475 U.S. 503 (1986).

[51] *O'Lone* v. *Estate of Shabazz*, 482 U.S. —, 96 L.Ed.2d 282, 290 (1987) (quoting *Turner* v. *Safley*, 482 U.S. —, 96 L.Ed.2d 64, 79 (1987)).

cerns of security and order, no exemption was required to permit Muslim inmates to participate in Jumu'ah, the core ceremony of their religion.[52] The fact that the inmates were left with no alternative means of attending Jumu'ah was not dispositive, the Court being "unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that end." [53]

Finally, as noted in the preceding section, *Sherbert's* compelling interest test has been held inapplicable in cases viewed as involving attempts by individuals to alter governmental actions rather than attempts by government to restrict religious practices. While an exemption from the social security number requirement might have been granted with only slight impact on the government's recordkeeping capabilities, no such exemption was possible in the case of the forest service road. The Court emphasized that, however severe the impact on religious beliefs and practices, "[i]n neither case . . . would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would either governmental action penalize religious activity." [54]

FREEDOM OF EXPRESSION—SPEECH AND PRESS

The Doctrine of Prior Restraint

Injunctions and the Press in Fair Trial Cases

[P. 1010, add to N.11, end of first paragraph:]

See also City of Lakewood v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988) (ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property is facially invalid as prior restraint).

[P. 1012, add to text following N.20:]

On a different level, however, are orders restraining the press as a party to litigation in the dissemination of information obtained through pretrial discovery. In *Seattle Times Co.* v. *Rhinehart*,[55] the Court determined that such orders protecting parties

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[52] *O'Lone* v. *Estate of Shabazz*, 482 U.S. —, 96 L.Ed.2d 282 (1987).

[53] 96 L.Ed.2d at 292 (also suggesting that the ability of the inmates to engage in other activities required by their faith, e.g. individual prayer and observance of Ramadan, rendered the restriction reasonable).

[54] *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. —, 99 L.Ed.2d 534 (1988).

[55] 467 U.S. 20 (1984).

from abuses of discovery require "no heightened First Amendment scrutiny." [56]

Subsequent Punishment: Clear and Present Danger and Other Tests

— Of Other Tests and Standards:

[P. 1030, add to end of N.17:]

Secretary of State of Maryland v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); *City of Houston* v. *Hill*, 482 U.S. —, 96 L.Ed.2d 398 (1987) (city ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty); *Board of Airport Comm'rs* v. *Jews for Jesus*, 482 U.S. —, 96 L.Ed.2d 500 (1987) (resolution banning all "First Amendment activities" at airport).

Right of Association

[P. 1039, add to N.17:]

These cases do not, however, stand for the proposition that individuals are always entitled to representation of counsel in administrative proceedings. *See Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding limitation to $10 of fee that may be paid attorney in representing veteran's death or disability claims before VA).

[P. 1039, add to N.18:]

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984).

[P. 1039, add new paragraph at end of section:]

In a series of three decisions, the Court explored the extent to which associational rights may be burdened by nondiscrimination requirements. First, *Roberts* v. *United States Jaycees* [57] upheld application of the Minnesota Human Rights Act to prohibit the United States Jaycees from excluding women from full membership. Three years later in *Board of Directors of Rotary Int'l* v. *Rotary Club of Duarte*,[58] the Court applied *Roberts* in upholding application of a similar California law to prevent Rotary International from excluding women from membership. Then, in *New York State Club Ass'n* v. *New York City*,[59] the Court upheld

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[56] 467 U.S. at 36. The decision was unanimous, all other Justices joining Justice Powell's opinion for the Court, but with Justices Brennan and Marshall noting additionally that under the facts of the case important interests in privacy and religious freedom were being protected. *Id.*, at 37, 38.

[57] 468 U.S. 609 (1984).

[58] 481 U.S. —, 95 L.Ed.2d 474 (1987).

[59] 487 U.S. —, 101 L.Ed.2d 1 (1988).

against facial challenge New York City's Human Rights Law, which prohibits race, creed, sex, and other discrimination in places "of public accommodation, resort, or amusement," and applies to clubs of more than 400 members providing regular meal service and supported by nonmembers for trade or business purposes. In *Roberts*, both the Jaycees' nearly indiscriminate membership requirements and the State's compelling interest in prohibiting discrimination against women were important to the Court's analysis. On the one hand, the Court found, "the local chapters of the Jaycees are large and basically unselective groups," age and sex being the only established membership criteria in organizations otherwise entirely open to public participation. The Jaycees, therefore, "lack the distinctive characteristics [e.g. small size, identifiable purpose, selectivity in membership, perhaps seclusion from the public eye] that might afford constitutional protection to the decision of its members to exclude women." [60] Similarly, the Court determined in *Rotary International* that Rotary Clubs, designed as community service organizations representing a cross section of business and professional occupations, also do not represent "the kind of intimate or private relation that warrants constitutional protection." [61] And in the *New York City* case, the fact that the ordinance "certainly could be constitutionally applied at least to some of the large clubs, under [the] decisions in *Rotary* and *Roberts*, the applicability criteria "pinpointing organizations which are 'commercial' in nature," helped to defeat the facial challenge.[62]

Some amount of First Amendment protection is still due such organizations; the Jaycees and its members had taken public positions on a number of issues, and had engaged in "a variety of civic, charitable, lobbying, fundraising and other activities worthy of constitutional protection." However, the *Roberts* Court could find "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views." [63] Moreover, the State had a "compelling interest to prevent . . . acts of invidious discrimination in the distribution of publically available goods, services, and other advantages." [64]

Because of the near-public nature of the Jaycees and Rotary Clubs—the Court in *Roberts* likening the situation to a large busi-

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[60] 468 U.S. at 621.
[61] 95 L.Ed.2d at 484–85.
[62] 101 L.Ed.2d at 15.
[63] 468 U.S. at 626–27.
[64] 468 U.S. at 628.

ness attempting to discriminate in hiring or in selection of customers—the cases may be limited in application, and should not be read as governing membership discrimination by private social clubs.[65] In *New York City*, the Court noted that "opportunities for individual associations to contest the constitutionality of the Law as it may be applied against them are adequate to assure that any overbreadth . . . will be curable through case-by-case analysis of specific facts." [66]

[P. 1040, add to N.23:]

Storer v. *Brown* was distinguished in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), holding invalid a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot; state interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters. *See also Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986) (state interests are insubstantial in imposing "closed primary" under which a political party is prohibited from allowing independents to vote in its primaries).

[P. 1044, add to text following N.14:]

The Court has now indicated, however, that a proportionate refund is inadequate because "even then the union obtains an involuntary loan for purposes to which the employee objects," [67] and that an advance reduction of dues does not correct the problem unless accompanied by sufficient information with which employees may gauge the propriety of the union's fee.[68] Moreover, the union procedure must also "provide for a reasonably prompt decision by an impartial decisionmaker." [69]

Maintenance of National Security and the First Amendment

— Interference With War Effort

[P. 1058, add to end of section:]

Similarly, the Court upheld a "passive enforcement" policy singling out for prosecution for failure to register for the draft those

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[65] The Court in *Rotary* rejected an assertion that *Roberts* had recognized that Kiwanis Clubs are constitutionally distinguishable, and suggested that a case-by-case approach is necessary to determine whether "the 'zone of privacy' extends to a particular club or entity." 95 L.Ed.2d at 485 n.6.

[66] 101 L.Ed.2d at 17.

[67] *Ellis* v. *Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435 (1984).

[68] *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292 (1986).

[69] 475 U.S. at 309.

young men who notified authorities of an intention not to register for the draft and those reported by others.[70]

— Suppression of Communist Propaganda in the Mails

[P. 1058, add new paragraph to end of section]

By contrast, the Court upheld statutory classification as "political propaganda" of communications or expressions by or on behalf of foreign governments, foreign "principals," or their agents, and reasonably adapted or intended to influence United States foreign policy.[71] "The physical detention of materials, not their mere designation as 'communist political propaganda,' was the offending element of the statutory scheme [in *Lamont*]." [72]

Government as Employer: Political Activities

[P. 1062, add new paragraph to end of section:]

In *Bush* v. *Lucas* [73] the Court held that the civil service laws and regulations are sufficiently "elaborate [and] comprehensive" so as to afford federal employees adequate remedy for deprivation of First Amendment rights as a result of disciplinary actions by supervisors, and that therefore there is no need to create an additional judicial remedy for the constitutional violation.

Government as Employer: Free Expression Generally

[P. 1064, add to N. 21:]

Contrast Connick v. *Myers*, 461 U.S. 138 (1983), where *Pickering* was distinguished on the basis that the employee, an assistant district attorney, worked in an environment where a close personal relationship involving loyalty and harmony were important; "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.*, at 151-52.

[P. 1065, add to text following N.22:]

Pickering was distinguished in *Connick* v. *Myers*,[74] involving what the Court characterized as an employee grievance rather

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[70] *Wayte* v. *United States*, 470 U.S. 598 (1985). The incidental restriction on First Amendment rights to speak out against the draft was no greater than necessary to further the government's interests in "prosecutorial efficiency," obtaining sufficient proof prior to prosecution, and promoting general deterrence (or not appearing to condone open defiance of the law). *See also United States* v. *Albertini*, 472 U.S. 675 (1985) (order banning civilian from entering military base valid as applied to attendance at base open house by person previously convicted of destroying military property).

[71] *Meese* v. *Keene*, 481 U.S. —, 95 L.Ed.2d 415 (1987).

[72] 95 L.Ed.2d at 428.

[73] 462 U.S. 367 (1983).

[74] 461 U.S. 138 (1983).

than an effort to inform the public on a matter of public interest. The employee, an assistant district attorney involved in a dispute with her supervisor over transfer to a different section, was fired for insubordination after she had circulated a questionnaire among her peers soliciting views on matters relating to employee morale. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." [75] The Court has indicated as well that an employee's speech may be protected as relating to matters of public concern even in the absence of any effort or intent to inform the public. In *Rankin* v. *McPherson* [76] the Court held protected an employee's comment, made to a coworker upon hearing of an unsuccessful attempt to assassinate the President, and in a context critical of the President's policies, "If they go for him again, I hope they get him." Indeed, the Court in *McPherson* emphasized the clerical employee's lack of contact with the public in concluding that the employer's interest in maintaining the efficient operation of the office (including public confidence and good will) was insufficient to outweigh the employee's First Amendment rights. [77]

[P. 1066, add to N.5:]

See also Minnesota State Bd. for Community Colleges v. *Knight*, 465 U.S. 271 (1984) (public employees not members of union have no First Amendment right to meet separately with public employers compelled by state law to "meet and confer" with exclusive bargaining representative).

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[75] 461 U.S. at 146. *Connick* was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that information concerning morale at an important government office is a matter of public concern, and that the Court extended too much deference to the employer's judgment as to disruptive effect.

[76] 483 U.S. —, 97 L.Ed.2d 315 (1987). This was a 5–4 decision, with Justice Marshall's opinion of the Court being joined by Justices Brennan, Blackmun, Powell, and Stevens, and with Justice Scalia's dissent being joined by Chief Justice Rehnquist, and by Justices White and O'Connor. Justice Powell added a separate concurring opinion.

[77] "Where . . . an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful function from that employee's private speech is minimal." 97 L.Ed.2d at 328.

Government as Educator

[P. 1067, add to N.11:]

However, offensive "indecent" speech in the context of a high school assembly is punishable by school authorities. *See Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675 (1986) (upholding 2-day suspension, and withdrawal of privilege of speaking at graduation, for student who used sophomoric sexual metaphor in speech given to school assembly).

[P. 1069, add to end of section:]

Tinker was distinguished in *Hazelwood School Dist.* v. *Kuhlmeier*,[78] the Court relying on public forum analysis to hold that editorial control and censorship of a student newspaper sponsored by a public high school need only be "reasonably related to legitimate pedagogical concerns." [79] "The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." [80] The student newspaper had been created by school officials as a part of the school curriculum, and served "as a supervised learning experience for journalism students." Because no public forum had been created, school officials could maintain editorial control subject only to a reasonableness standard. Thus, a principal's decision to excise from the publication an article describing student pregnancy in a manner believed inappropriate for younger students, and another article on divorce critical of a named parent, was upheld.

The category of school-sponsored speech subject to *Kuhlmeier* analysis may be far broader than the category of student expression still governed by *Tinker*. School-sponsored activities, the Court indicated, can include "publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." [81]

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[78] 484 U.S. —, 98 L.Ed.2d 592 (1988).
[79] 98 L.Ed.2d at 606.
[80] *Id.* at 605.
[81] *Id.*

Government as Regulator of the Electoral Process

[P. 1072, add to N.3:]

When the validity of this provision, 26 U.S.C. § 9012(f), was again before the Court in 1985, the Court invalidated it by vote of 7–2. *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985). In an opinion by Justice Rehnquist, the Court determined that the governmental interest in preventing corruption or the appearance of corruption was insufficient justification for restricting the First Amendment rights of committees interested in making independent expenditures on behalf of a candidate, since "the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.*, at 498.

[P. 1072, add new paragraph following N.5:]

Although the Court in *Buckley* upheld the Act's reporting and disclosure requirements, it indicated that under some circumstances the First Amendment might require exemption for minor parties able to show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." [82] This standard was applied both to disclosure of contributors' names and to disclosure of recipients of campaign expenditures in *Brown* v. *Socialist Workers '74 Campaign Committee*,[83] in which the Court held that the minor party had established the requisite showing of likely reprisals through proof of past governmental and private hostility and harassment. Disclosure of recipients of campaign expenditures, the Court reasoned, could not only dissuade supporters and workers who might receive reimbursement for expenses, but could also dissuade various entities from performing routine commercial services for the party and thereby "cripple a minor party's ability to operate effectively." [84]

[P. 1072, add to end of paragraph containing N.6:]

Similarly, the Court invalidated a criminal prohibition on payment of persons to circulate petitions for a ballot initiative.[85]

[P. 1073, add to end of section:]

The provision has now been interpreted twice by the Court. First, in *FEC* v. *National Right to Work Comm.*,[86] the Court unani-

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[82] 424 U.S. at 74.
[83] 459 U.S. 87 (1982).
[84] 459 U.S. at 97–98.
[85] *Meyer* v. *Grant*, 486 U.S. —, 100 L.Ed.2d 425 (1988).
[86] 459 U.S. 197 (1982).

mously upheld section 441b's prohibition on corporate solicitation of money from corporate nonmembers for use in federal elections. Relying on *Bellotti* for the proposition that government may act to prevent "both actual corruption and the appearance of corruption of elected representatives," the Court concluded that "there is no reason why . . . unions, corporations, and similar organizations [may not be] treated differently f[r]om individuals." [87] However, an exception to this general principle was recognized by a divided Court in *FEC* v. *Massachusetts Citizens for Life, Inc.*,[88] holding the section's independent expenditure limitations (not limiting expenditures but requiring only that such expenditures be financed by voluntary contributions to a separate segregated fund) unconstitutional as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a "business corporation" or union. One of the rationales for the special rules on corporate participation in elections—elimination of "the potential for unfair deployment of [corporate] wealth for political purposes"—has no applicability to such a corporation "formed to disseminate political ideas, not to amass capital." [89] The other principal rationale—protection of corporate shareholders and other contributors from having their money used to support political candidates to whom they may be opposed—was also deemed inapplicable. The Court distinguished *National Right to Work Committee* because "restrictions on contributions require less compelling justification than restrictions on independent spending," and also explained that "given a contributor's awareness of the political activity of [MCFL], as well as the readily available remedy of refusing further donations, the interest protecting contributors is simply insufficient to support § 441b's restriction on . . . independent spending." [90] What the Court did not address directly was whether the same analysis could have led to a different result in *National Right to Work Committee*.[91]

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[87] 459 U.S. at 210–11.

[88] 479 U.S. —, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986). Justice Brennan's opinion for the Court was joined by Justices Marshall, Powell, O'Connor, and Scalia; Chief Justice Rehnquist, author of the Court's opinion in *National Right to Work Comm.*, dissented from the constitutional ruling, and was joined by Justices White, Blackmun, and Stevens.

[89] 93 L.Ed.2d at 557.

[90] *Id.* at 557, 559.

[91] The Court did not spell out whether there was any significant distinction between the two organizations, NRWC and MCFL; Chief Justice Rehnquist's dissent suggested that there was not.

Government and the Conduct of Trials

[P. 1078, add to N.9:]

See also Seattle Times Co. v. *Rhinehart*, 467 U.S. 20 (1984) (press, as party to action, restrained from publishing information obtained through discovery).

[P. 1079, add to N.13:]

The emphasis on experience and history was repeated by the Chief Justice in his opinion for the Court in *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*).

[P. 1080, add new paragraph to end of section:]

The Court has now had the opportunity to apply and extend *Richmond Newspapers* in several more areas, striking down state efforts to exclude the public from *voir dire* proceedings, from a suppression hearing, and from a preliminary hearing. The Court determined in *Press-Enterprise I*[92] that historically *voir dire* had been open to the public, and that "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[93] No such findings had been made by the state court, which had ordered closed, in the interest of protecting the privacy interests of some prospective jurors, 41 of the 44 days of *voir dire* in a rape-murder case. The trial court also had not considered the possibility of less restrictive alternatives, e.g. *in camera* consideration of jurors' requests for protection from publicity. In *Waller* v. *Georgia*,[94] the Court held that "under the Sixth Amendment, any closure of a suppression hearing over the objections of the accused must meet the tests set out in *Press Enterprise*," and noted that the need for openness at suppression hearings "may be particularly strong" due to the fact that the conduct of police and prosecutor is often at issue.[95] And in *Press Enterprise II*,[96] the Court held that there is a similar First Amendment right of the public to access to most criminal proceedings (here a preliminary hearing) even when the accused requests that the proceedings be closed. Thus, an accused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that

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[92] *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501 (1984).
[93] 464 U.S. at 510.
[94] 467 U.S. 39 (1984).
[95] 467 U.S. at 47.
[96] *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1 (1986).

closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights." [97] Openness of preliminary hearings was deemed important because, under California law, the hearings can be "the final and most important step in the criminal proceeding" and therefore may be " 'the sole occasion for public observation of the criminal justice system,' " and also because the safeguard of a jury is unavailable at preliminary hearings.[98]

— Government as Administrator of Prisons

[P. 1081, add to text as first complete paragraph on page:]

In *Turner* v. *Safley*,[99] the Court made clear that a more deferential standard is applicable when only the communicative rights of inmates are at stake. In upholding a Missouri rule barring inmate-to-inmate correspondence, while striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child, the Court announced the appropriate standard. "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Several considerations are appropriate in determining reasonableness of a regulation. First, there must be a rational relation to a legitimate, content-neutral objective. Prison security, broadly defined, is one such objective. Availability of other avenues for exercise of the inmate right suggests reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation "that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests" suggests unreasonableness.

Governmental Regulation of Communications Industries

— Commercial Speech

[P. 1086, add to text following N.11:]

Nor may a state categorically prohibit attorney advertising through mailings that target persons known to face particular legal problems.[100]

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[97] 478 U.S. at 14.
[98] 478 U.S. at 12.
[99] 482 U.S. —, 96 L.Ed.2d 64 (1987).
[100] *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. —, 100 L.Ed.2d 475 (1988).

[P. 1086, add to N.12:]

The distinction between in-person and other attorney advertising was continued in *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) ("print advertising . . . in most cases . . . will lack the coercive force of the personal presence of the trained advocate").

[P. 1086, add to N.14:]

However, the linking of a product to matters of public debate does not thereby entitle an ad to the increased protection afforded noncommercial speech. *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

[P. 1086, add to N.15]

So too, the Court has refused to treat as commercial speech charitable solicitation undertaken by professional fundraisers, characterizing the commercial component as "inextricably intertwined with otherwise fully protected speech." *Riley* v. *National Fed'n of the Blind*, 487 U.S. —, 101 L.Ed.2d 669, 689 (1988).

[P. 1087, add to N.17:]

See also San Francisco Arts & Athletics, Inc. v. *United States Olympic Comm.*, 483 U.S. —, 97 L.Ed.2d 427 (1987) (governmental interest in protecting USOC's exclusive use of word "Olympic" is substantial). However, in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court deemed insubstantial a governmental interest in protecting postal patrons from offensive but not obscene materials. For deferential treatment of the governmental interest, *see Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (Puerto Rico's "substantial" interest in discouraging casino gambling by residents justifies ban on ads aimed at residents even though residents may legally engage in casino gambling, and even though ads aimed at tourists are permitted).

[P. 1087, add to N.18 following *Virginia Bd.* cite:]

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

[P. 1087, add to N. 19:]

And see Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983), where the Court held that the governmental interest in not interfering with parental efforts at controlling children's access to birth control information could not justify a ban on commercial mailings about birth control products; "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." *Id.*, at 74. Note, however, that in *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. —, 97 L.Ed.2d 427 (1987), the Court applied the test in a manner deferential to Congress: "the restrictions [at issue] are not broader than Congress reasonably could have determined to be necessary to further these interests."

[P. 1087, add to N.20:]

Requirements that advertisers disclose more information than they otherwise choose to are upheld "as long as [they] are reasonably related to the State's interest in preventing deception of consumers," the Court explaining that "[t]he right of a commercial speaker not to divulge accurate information regarding his services is not . . . a fundamental right" requiring strict scrutiny of the disclosure requirement. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 & n.14 (1985) (up-

holding requirement that attorney's contingent fees ad mention that unsuccessful plaintiffs might still be liable for court costs).

[P. 1088, add to text following N.23:]

Whether government may ban all commercial advertising of a service or product that is legal to sell is a matter of current debate. In *Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*,[101] the Court upheld a Puerto Rico ban on advertising of casino gambling aimed at residents, who nonetheless were not prohibited from engaging in casino gambling. The advertising ban was far from complete, however, since ads aimed at the lucrative tourist trade were still permitted.

— Taxation

[P. 1088, add to N.2:]

Grosjean was distinguished on this basis in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

[P. 1088, add to text following N.4]

The Court has elaborated on the governing principles, indicating that any tax singling out the press for differential treatment is highly suspect, and creates a heavy burden of justification on the state.[102] This is so, the Court concluded, because such "a powerful weapon" to single out a small group carries with it a lessened political constraint than do those measures affecting a broader based constituency, and because "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression."[103]

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[101] 478 U.S. 328 (1986). The Court's opinion by Justice Rehnquist distinguished earlier cases (*Carey* and *Bigelow*) invalidating bans on advertisements of contraceptives and abortion services because there "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited." Casino gambling, on the other hand, is not such protected conduct, and the Court announced a potentially sweeping principle that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345–46. For discussion of the case, *see* P. Kurland, "Posadas de Puerto Rico v. Tourism Company: ' "Twas Strange, "Twas Passing Strange; "Twas Pitiful, "Twas Wondrous Pitiful,' " 1986 Sup. Ct. Rev. 1. For qualification based on the commmercial nature of speech in *Posadas*, *see Meyer* v. *Grant*, 486 U.S. —, 100 L.Ed.2d 425, 437 (1988) (power to ban ballot initiatives entirely does not include power to limit discussion of political issues raised by initiative petitions).

[102] *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

[103] 460 U.S. at 585.

The state's interest in raising revenue is not sufficient justification for differential treatment of the press. Moreover, the Court refused to adopt a rule permitting analysis of the "effective burden" imposed by a differential tax; even if the current effective tax burden could be measured and upheld, the threat of increasing the burden on the press might have "censorial effects," and "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation." [104]

So too, taxation that targets specific groups within the press for differential treatment is difficult to justify. An Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state was struck down as an invalid content-based regulation of the press.[105] Entirely as a result of content, some magazines were treated less favorably than others. The general interest in raising revenue was again rejected as a "compelling" justification for such treatment, and the measure was viewed as not narrowly tailored to achieve other asserted state interests in encouraging "fledgling" publishers and in fostering communications.

— Radio and Television

[P. 1091, add new paragraph to text following N.16:]

In *FCC* v. *League of Women Voters*,[106] the Court took the same general approach to governmental regulation of public broadcasting, but struck down a total ban on editorializing by stations receiving public funding. In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts, but indicated that broadcasters are entitled to greater protection than may have been suggested by *Red Lion*. "[A]lthough the broadcasting industry plainly operates under restraints not imposed upon other media, the thrust of these restrictions has generally been to secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern. . . . [T]hese restrictions have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmen-

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[104] 460 U.S. at 588, 589.

[105] *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. —, 95 L.Ed.2d 209 (1987).

[106] 468 U.S. 364 (1984), holding unconstitutional § 399 of the Public Broadcasting Act of 1967, as amended. The decision was 5–4, with Justice Brennan's opinion for the Court being joined by Justices Marshall, Blackmun, Powell, and O'Connor, and with Justices White, Rehnquist (joined by Chief Justice Burger and by Justice White), and Stevens filing dissenting opinions.

tal interest." [107] However, the earlier cases were distinguished. "[I]n sharp contrast to the restrictions upheld in *Red Lion* or in [*CBS* v. *FCC*], which left room for editorial discretion and simply required broadcast editors to grant others access to the microphone, § 399 directly prohibits the broadcaster from speaking out on public issues even in a balanced and fair manner." [108] The ban on all editorializing was deemed too severe and restrictive a means of accomplishing the governmental purposes—protecting public broadcasting stations from being coerced, through threat or fear of withdrawal of public funding, into becoming "vehicles for governmental propagandizing," and also keeping the stations "from becoming convenient targets for capture by private interest groups wishing to express their own partisan viewpoints." [109] Expression of editorial opinion was described as a "form of speech . . . that lies at the heart of First Amendment protection," [110] and the ban was said to be "defined solely on the basis of . . . content," the assumption being that editorial speech is speech directed at "controversial issues of public importance." [111] Moreover, the ban on editorializing was both overinclusive, applying to commentary on local issues of no likely interest to Congress, and underinclusive, not applying at all to expression of controversial opinion in the context of regular programming. Therefore, the Court concluded, the restriction was not narrowly enough tailored to fulfill the government's purposes.

[P. 1093, add new paragraph at end of section:]

The Court has ruled that cable television "implicates First Amendment interests," since a franchisee communicates ideas through selection of original programming and through exercise of editorial discretion in determining which stations to include in its offering, but has left for future decision how these interests are to be balanced against a community's interests in limiting franchises and preserving utility space.[112]

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[107] 468 U.S. at 380. The Court rejected the suggestion that only a "compelling" rather than "substantial" governmental interest can justify restrictions.

[108] 468 U.S. at 385.

[109] 468 U.S. at 384–85. Dissenting Justice Stevens thought that the ban on editorializing served an important purpose of "maintaining government neutrality in the free marketplace of ideas." *Id.*, at 409.

[110] 468 U.S. at 381.

[111] 468 U.S. at 383.

[112] *City of Los Angeles* v. *Preferred Communications*, 476 U.S. 488 (1986).

Governmentally Compelled Right of Reply

[P. 1094, add to N.3:]

The Court has also held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. While a plurality opinion adhered to by four Justices relied heavily on *Tornillo*, there was not a Court majority consensus as to rationale. *Pacific Gas & Elec.* v. *Public Utilities Comm'n*, 475 U.S. 1 (1986).

Government Restraint of Content of Expression

[P. 1095, add to N.3:]

Regan v. *Time, Inc.*, 468 U.S. 641 (1984).

[P. 1095, add to text following N.3:]

Invalid content regulation is not limited to restrictions on particular viewpoints, but also includes prohibitions on public discussion of an entire topic.[113]

[P. 1096, add to N.7:]

Justice Scalia has expressed views similar to the Stevens approach. *See Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. —, 95 L.Ed.2d 209, 224–25 (1987) (dissenting).

[P. 1096, add new paragraph following N.11:]

That there can be a permissible content regulation within a category of protected expression was questioned in theory, and rejected in application, in *Hustler Magazine, Inc.* v. *Falwell*.[114] In *Falwell* the Court refused to recognize a distinction between permissible political satire and "outrageous" parodies "doubtless gross and repugnant in the eyes of most."[115] "If it were possible by laying down a principled standard to separate the one from the other," the Court suggested, "public discourse would probably suffer little or no harm. But we doubt that there is any such standard, and we are quite sure that the pejorative description 'outrageous' does not supply one."[116] *Falwell* can also be read as consistent with the hierarchical theory of interpretation; the offensive advertisement parody was protected as within "the world of debate about public affairs," and was not "governed by any exception to . . . general First Amendment principles."[117]

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[113] *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. —, 95 L.Ed.2d 209, 220 (citing *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 537 (1980)).

[114] 485 U.S. —, 99 L.Ed.2d 41 (1988).

[115] 99 L.Ed.2d at 48, 51–52.

[116] *Id.* at 51–52.

[117] *Id.* at 50.

— Defamation

[P. 1102, add to N.13:]

The same standard applies for defamation contained in petitions to the government, the Court having rejected the argument that the petition clause requires absolute immunity. *McDonald* v. *Smith*, 472 U.S. 479 (1985).

[P. 1107, add new paragraph following line 6:]

The Court has elaborated on the principles governing defamation actions brought by private figures. First, when a private plaintiff sues a media defendant for publication of information that is a matter of public concern—the *Gertz* situation, in other words—the burden is on the plaintiff to establish the falsity of the information. Thus, the Court held in *Philadelphia Newspapers* v. *Hepps*,[118] the common law rule that defamatory statements are presumptively false must give way to the First Amendment interest that true speech on matters of public concern not be inhibited. This means, as the dissenters pointed out, that a *Gertz* plaintiff must establish falsity in addition to establishing some degree of fault (e.g. negligence).[119] On the other hand, the Court held in *Dun & Bradstreet* v. *Greenmoss Builders* that the *Gertz* standard limiting award of presumed and punitive damages applies only in cases involving matters of public concern, and that the sale of credit reporting information to subscribers is not such a matter of public concern.[120] What significance, if any, is to be attributed to the fact that a media defendant rather than a private defendant has been sued is left unclear. The plurality in *Dun & Bradstreet* declined to follow the lower court's rationale that *Gertz* protections are unavailable to nonmedia defendants, and a majority of Justices were in agreement on that point.[121] But in *Philadelphia Newspapers*, the Court expressly reserved the issue of "what standards would apply if the plaintiff sues a nonmedia defendant."[122]

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[118] 475 U.S. 767 (1986). Justice O'Connor's opinion of the Court was joined by Justices Brennan, Marshall, Blackmun, and Powell; Justice Stevens' dissent was joined by Chief Justice Burger and by Justices White and Rehnquist.

[119] 475 U.S. at 780 (Stevens, J., dissenting).

[120] 472 U.S. 749 (1985). Justice Powell wrote a plurality opinion joined by Justices Rehnquist and O'Connor, and Chief Justice Burger and Justice White, both of whom had dissented in *Gertz*, added brief concurring opinions agreeing that the *Gertz* standard should not apply to credit reporting. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, dissented, arguing that *Gertz* had not been limited to matters of public concern, and should not be extended to do so.

[121] 472 U.S. at 753 (plurality); *id.* at 773 (Justice White); *id.* at 781–84 (dissent).

[122] 89 L.Ed.2d at 794 n.4. Justice Brennan added a brief concurring opinion expressing his view that such a distinction is untenable. *Id.*, at 795.

[P. 1107, add to N.12:]

A corollary is that the issue on motion for summary judgment in a *New York Times* case is whether the evidence is such that a reasonable jury might find that actual malice has been shown with convincing clarity. *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986).

[P. 1107, add to text following N.12:]

Moreover, the Court has held, a *Gertz* plaintiff has the burden of proving the actual falsity of the defamatory publication.[123]

[P. 1108, add to N.15:]

Bose Corp. v. *Consumers Union of United States*, 466 U.S. 485 (1984), holding that the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a) must be subordinated to this constitutional principle.

[P. 1110, add new section preceding "Right of Publicity":]

— Emotional Distress Tort Actions

In *Hustler Magazine, Inc.* v. *Falwell*,[124] the Court applied the *New York Times* v. *Sullivan* standard to recovery of damages by public officials and public figures for the tort of intentional infliction of emotional distress. The case involved an advertisement "parody," portraying the plaintiff, described by the Court as a "nationally known minister active as a commentator on politics and public affairs," as engaged in "a drunken incestuous rendezvous with his mother in an outhouse." [125] Affirming liability in this case, the Court believed, would subject "political cartoonists and satirists . . . to damage awards without any showing that their work falsely defamed its subject." [126] A proffered "outrageousness" standard for distinguishing such parodies from more traditional political cartoons was rejected. While not doubting that "the caricature of respondent . . . is at best a distant cousin of [some] political cartoons . . . and a rather poor relation at that," the Court explained that "[o]utrageousness" in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views." [127] Therefore, proof of intent to cause injury, "the grava-

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[123] *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767 (1986) (leaving open the issue of what "quantity" or standard of proof must be met).

[124] 485 U.S. —, 99 L.Ed.2d 41 (1988).

[125] 99 L.Ed.2d at 47.

[126] *Id.* at 50.

[127] *Id.* at 52.

men of the tort," is insufficient "in the area of public debate about public figures." Additional proof that the publication contained a false statement of fact made with actual malice was necessary, the Court concluded, in order "to give adequate 'breathing space' to the freedoms protected by the First Amendment." [128]

— Obscenity

[P. 1118, add to text following N. 14:]

By contrast, the third or "value" prong of the *Miller* test is not subject to a community standards test; instead, the appropriate standard is "whether a reasonable person would find [literary, artistic, political, or scientific] value in the material, taken as a whole." [129]

[P. 1121, add new paragraph to end of section:]

Facial invalidation is an inappropriate remedy when an obscenity statute's unconstitutionality can be cured by excision of one word that the lower court had interpreted as proscribing appeal to "normal, healthy sexual desires." [130] Moreover, harmless error inquiry can save some convictions under invalid jury instructions.[131]

— Nonobscene But Sexually Explicit and Indecent Expression

[P. 1122, add to N.9:]

Young was followed in *City of Renton* v. *Playtime Theatres*, 475 U.S. 41 (1986), upholding a city ordinance prohibiting location of adult theaters within 1,000 feet of residential areas, churches, or parks and within one mile of any school. Rejecting the claim that the ordinance regulated content of speech, the Court indicated that such time, place and manner regulations are valid if "designed to serve a substantial governmental interest" and if "allow[ing] for reasonable alternative avenues of communication." *Id.*, at 39. The city had a substantial interest in regulating the "undesirable secondary effects" of such businesses. And, while the suitability for adult theaters of the remaining 520 acres within the city was disputed, the Court held that the theaters "must fend for themselves in the real estate market," and are entitled only to "a reasonable opportunity to open and operate." *Id.*, at 42.

[P. 1122, add to text following N.9]

Similarly, an adult bookstore is subject to closure as a public nuisance if it is being used as a place for prostitution and illegal sexual activities, since the closure "was directed at unlawful conduct having nothing to do with books or other expressive activity." [132]

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[128] *Id.* at 50.
[129] *Pope* v. *Illinois*, 481 U.S. —, 95 L.Ed.2d 439, 445 (1987).
[130] *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985).
[131] *Pope* v. *Illinois*, 481 U.S. —, 95 L.Ed.2d 439 (1987).
[132] *Arcara* v. *Cloud Books*, 478 U.S. 697 (1986).

Speech Plus

— Public Forum

[P. 1124, add to N.11:]

A restriction on carrying signs or placards on the grounds of the Supreme Court is unconstitutional as applied to the public sidewalks surrounding the Court, since it does not sufficiently further the governmental purposes of protecting the building and grounds, maintaining proper order, or insulating the judicial decisionmaking process from lobbying. *United States* v. *Grace*, 461 U.S. 171 (1983).

[P. 1124, add to text following N.11:]

foreign embassies,[133]

[P. 1125, add to N.13:]

Frisby v. *Schultz*, 487 U.S. —, 101 L.Ed.2d 420 (1988) (ordinance prohibiting picketing "before or about" any residence or dwelling, narrowly construed as prohibiting only picketing that targets a particular residence, upheld as furthering significant governmental interest in protecting the privacy of the home).

[P. 1125, add to N.19:]

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) (prohibition of sleep-in demonstration in area of park not designated for overnight camping).

[P. 1126, add to N.23:]

These principles apply only to the traditional public forum and to the governmentally created "limited public forum." Government may, without creating a limited public forum, place "reasonable" restrictions on access to nonpublic areas. *See, e.g. Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983) (use of school mail system); and *Cornelius* v. *NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985) (charitable solicitation of federal employees at workplace).

[P. 1126, add to N.24 following *Jones v. Opelika* cite:]

See also City of Lakewood v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988) (upholding facial challenge to ordinance vesting in the mayor unbridled discretion to grant or deny annual permit for location of newsracks on public property); *Riley* v. *National Fed'n of the Blind*, 487 U.S. —, 101 L.Ed.2d 669 (1988) (invalidating as permitting "delay without limit" licensing requirement for professional fundraisers).

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[133] In *Boos* v. *Barry*, 485 U.S. —, 99 L.Ed.2d 333 (1988), the Court struck down as content-based a District of Columbia law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute." However, another aspect of the District's law, making it unlawful for three or more persons to congregate within 500 feet of an embassy and refuse to obey a police dispersal order, was upheld; under a narrowing construction, the law had been held applicable only to congregations directed at an embassy, and reasonably believed to present a threat to the peace or security of the embassy.

[P. 1127, add new paragraph at end of section:]

The Court has defined three different categories of public property for public forum analysis. First, there is the public forum, places such as streets and parks which have traditionally been used for public assembly and debate, where the government may not prohibit all communicative activity and must justify content-neutral time, place, and manner restrictions as narrowly tailored to serve some legitimate interest. Government may also open property for communicative activity, and thereby create a public forum. Such a forum may be limited—hence the expression "limited public forum"—for "use by certain groups, e.g. *Widmar* v. *Vincent* (student groups), or for discussion of certain subjects, e.g. *City of Madison Joint School District* v. *Wisconsin PERC* (school board business)," [134] but within the framework of such legitimate limitations discrimination based on content must be justified by compelling governmental interests.[135] Thirdly, government "may reserve a forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." [136] The distinction between the second and third categories can therefore be of crucial importance, since speakers may be excluded from the second category only for a "compelling" governmental interest, while exclusion from the third category need only be "reasonable." Yet, distinguishing between the two categories creates no small difficulty, as evidenced by recent case law.

The Court has held that a school system did not create a limited public forum by opening an interschool mail system to use by selected civic groups "that engage in activities of interest and educational relevance to students," and that, in any event, if a limited public forum had thereby been created a teachers union rivaling the exclusive bargaining representative could still be excluded as not being "of a similar character" to the civic groups.[137] Less problematic was the Court's conclusion that utility poles and other municipal property did not constitute a public forum for the posting of signs.[138] More problematic was the Court's conclusion that the

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[134] *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

[135] 460 U.S. at 46.

[136] *Id.*

[137] *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). This was a 5–4 decision, with Justice White's opinion of the Court being joined by Chief Justice Burger and by Justices Blackmun, Rehnquist, and O'Connor, and with Justice Brennan's dissent being joined by Justices Marshall, Powell, and Stevens. *See also Hazelwood School Dist.* v. *Kuhlmeier*, 484 U.S. —, 98 L.Ed.2d 592 (1988) (student newspaper published as part of journalism class is not a public forum).

[138] *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding an outright ban on use of utility poles for signs). The Court noted that "it is of limited

Combined Federal Campaign, the Federal Government's forum for coordinated charitable solicitation of federal employees, is not a limited public forum. Exclusion of various advocacy groups from participation in the Campaign was upheld as furthering "reasonable" governmental interests in offering a forum to "traditional health and welfare charities," avoiding the appearance of governmental favoritism of particular groups or viewpoints, and avoiding disruption of the federal workplace by controversy.[139] The Court pinpointed the government's intention as the key to whether a public forum has been created: "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse." [140] Thus, apparently, the government has wide discretion in maintaining the nonpublic character of its forums, and may regulate in ways that would be impermissible were it to designate a limited public forum.

[P. 1127, add to N.1:]

The military may ban a civilian, previously convicted of destroying government property, from reentering a military base, and may apply the ban to prohibit the civilian from reentering the base for purposes of peaceful demonstration during an Armed Forces Day "open house." *United States* v. *Albertini*, 472 U.S. 675 (1985).

— Quasi-Public Places

[P. 1127, add to N.3:]

See also Frisby v. *Schultz*, 487 U.S. —, 101 L.Ed.2d 420 (1988) (government may protect residential privacy by prohibiting altogether picketing that targets a single residence).

[P. 1129, add to N.12:]

But cf. Pacific Gas & Elec. v. *Public Utilities Comm'n*, 475 U.S. 1 (1986), holding that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees, a majority of Justices distinguishing PruneYard as not involving such forced association with others' beliefs.

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utility in the context of this case to focus on whether the tangible property itself should be deemed a public forum." *Id.*, at 815 n.32.

[139] *Cornelius* v. *NAACP Legal Defense and Educational Fund*, 473 U.S. 788 (1985). Precedential value of *Cornelius* may be subject to question, since it was decided by 4–3 vote, the non-participating Justices (Marshall and Powell) having dissented in *Perry*. Justice O'Connor wrote the opinion of the Court, joined by Chief Justice Burger and by Justices White and Rehnquist. Justice Blackmun, joined by Justice Brennan, dissented, and Justice Stevens dissented separately.

[140] 473 U.S. at 802. *See also* Justice Blackmun's criticism of "the Court's circular reasoning that the CFC is not a limited public forum because the Government intended to limit the forum to a particular class of speakers." *Id.*, at 813–14.

— Public Issue Picketing and Parading

— Leafleting, Handbilling, and the Like

[P. 1137, add to end of section:]

The handbilling cases were distinguished in *City Council* v. *Taxpayers for Vincent*,[141] in which the Court held that a city may prohibit altogether the use of utility poles for posting of signs. While a city's concern over visual blight could be addressed by an anti-littering ordinance not restricting the expressive activity of distributing handbills, in the case of posting signs "it is the medium of expression itself" that creates the visual blight. Hence, a prohibition on posting signs, unlike a prohibition on distributing handbills, is narrowly tailored to curtail no more speech than necessary to accomplish the city's legitimate purpose.[142]

— Door-to-Door Solicitation

[P. 1138, add to N.11:]

Meyer v. *Grant*, 486 U.S. —, 100 L.Ed.2d 425 (1988) (criminal penalty on use of paid circulators to obtain signatures for ballot initiative suppresses political speech in violation of First and Fourteenth Amendments).

[P. 1139, add to end of section:]

Shaumberg was extended in *Secretary of State of Maryland* v. *Joseph H. Munson Co.*,[143] and *Riley* v. *National Fed'n of the Blind*.[144] In *Munson* the Court invalidated a Maryland statute limiting professional fundraisers to 25% of the amount collected plus certain costs, and allowing waiver of this limitation if it would effectively prevent the charity from raising contributions. And in *Riley* the Court invalidated a North Carolina fee structure containing even more flexibility.[145] The Court sees "no nexus between the

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[141] 466 U.S. 789 (1984).

[142] Justice Brennan argued in dissent that adequate alternative forms of communication were not readily available because handbilling or other person-to-person methods would be substantially more expensive, and that the regulation for the sake of aesthetics was not adequately justified.

[143] 467 U.S. 947 (1984).

[144] 487 U.S. —, 101 L.Ed.2d 669 (1988).

[145] A fee of up to 20% of collected receipts was deemed reasonable, a fee between 20 and 35% was permissible if the solicitation involved advocacy or the dissemination of information, and a fee in excess of 35% was presumptively unreasonable, but could be upheld upon one of two showings: that advocacy or dissemination of information was involved, or that otherwise the charity's ability to collect money or communicate would be significantly diminished.

percentage of funds retained by the fundraiser and the likelihood that the solicitation is fraudulent," and is similarly hostile to any scheme that shifts the burden to the fundraiser to show that a fee structure is reasonable.[146] Moreover, a requirement that fundraisers disclose to potential donors the percentage of donated funds previously used for charity was also invalidated in *Riley*, the Court indicating that the "more benign and narrowly tailored" alternative of disclosure to the state (accompanied by state publishing of disclosed percentages) could make the information publicly available without so threatening the effectiveness of solicitation.[147]

— The Problem of "Symbolic Speech"

[P. 1139, add to N.17:]

On a different footing is expressive conduct in a place where such conduct is prohibited for reasons other than suppressing speech. *See Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984).

[P. 1140, add to text following N.19:]

The Court has suggested that this standard is virtually identical to that applied to time, place, or manner restrictions on expression.[148]

Rights of Assembly and Petition

[P. 1145, add to N.16:]

For another holding that the right to petition is not absolute, see *McDonald* v. *Smith*, 472 U.S. 479 (1985) (the fact that defamatory statements were made in the context of a petition to government does not provide absolute immunity for a defendant to a libel action).

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[146] 101 L.Ed.2d at 687.

[147] *Id.* at 691–92. North Carolina's requirement for licensing of professional fundraisers was also invalidated in *Riley*, *id.* at 692–93.

[148] *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298 & n.8 (1984) (upholding Park Service restriction on overnight sleeping as applied to demonstrators wishing to call attention to the plight of the homeless).

FOURTH AMENDMENT

History and Scope of the Amendment

— The Interest Protected

[P. 1162, add to N.15:]

Maryland v. *Macon*, 472 U.S. 463 (1985) (no legitimate expectation of privacy in denying to undercover officers allegedly obscene materials offered to public in bookstore).

[P. 1163, add to N.17:]

Hudson v. *Palmer*, 468 U.S. 517 (1984) (prison cell); *Illinois* v. *Andreas*, 463 U.S. 765 (1983) (shipping container opened and inspected by customs agents and resealed and delivered to the addressee); *California* v. *Greenwood*, 486 U.S. —, 100 L.Ed.2d 30 (1988) (garbage in sealed plastic bags left at curb for collection).

[P. 1164, add to N.23:]

There is also a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel. *California* v. *Carney*, 471 U.S. 386 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not adapted for immediate vehicular use).

— Arrests and Other Detentions

[P. 1164, add to N.4:]

Hayes v. *Florida*, 470 U.S. 811 (1985) (officers went to suspect's home and took him to police station for fingerprinting).

[P. 1166, add to N.10:]

And see Hayes v. *Florida*, 470 U.S. 811, 815 (1985), suggesting in dictum that a "narrowly circumscribed procedure for fingerprinting detentions on less than probable cause" may be permissible.

— Searches and Inspections in Noncriminal Cases

[P. 1168, add to N.22:]

Accord, New York v. *Burger*, 482 U.S. —, 96 L.Ed.2d 601 (1987) (although duration of regulation of vehicle dismantling was relatively brief, history of regulation of junk business generally was lengthy, and current regulation of dismantling was extensive).

[P. 1169, add as first full paragraph on page:]

Dewey was applied in *New York* v. *Burger*[1] to inspection of automobile junkyards and vehicle dismantling operations, a situa-

[1] 482 U.S. —, 96 L.Ed.2d 601 (1987).

tion where there is considerable overlap between administrative and penal objectives. Applying the *Dewey* three-part test, the Court concluded that New York has a substantial interest in stemming the tide of automobile thefts, that regulation of vehicle dismantling reasonably serves that interest, and that statutory safeguards provided adequate substitute for a warrant requirement. The Court rejected the suggestion that the warrantless inspection provisions were designed as an expedient means of enforcing the penal laws, and instead saw narrower, valid regulatory purposes to be served: e.g., establishing a system for tracking stolen automobiles and parts, and enhancing the ability of legitimate businesses to compete. "[A] State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions," the Court declared; in such circumstances warrantless administrative searches are permissible in spite of the fact that evidence of criminal activity may well be uncovered in the process.[2]

[P. 1169, add to N.24:]

But cf. Michigan v. *Clifford*, 464 U.S. 287 (1984) (no such justification for search of private residence begun at 1:30 p.m. when fire had been extinguished at 7 a.m.).

[P. 1169, add to text following N.25:]

In addition, there are now a number of situations, some of them analogous to administrative searches, where " 'special needs' beyond normal law enforcement . . . justify departures from the usual warrant and probable cause requirements." [3]

Searches and Seizures Pursuant to Warrant

— Probable Cause

[P. 1174, add new paragraph at end of section:]

The Court has now expressly abandoned the two-part *Aguilar-Spinelli* test and returned to the "totality of the circumstances" approach to evaluate probable cause based on an informant's tip.[4]

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[2] 96 L.Ed.2d at 620.

[3] *Griffin* v. *Wisconsin*, 483 U.S. —, 97 L.Ed.2d 709, 717 (1987) (administrative needs of probation system justify warrantless searches of probationers' homes on less than probable cause); *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984) (no Fourth Amendment protection from search of prison cell); *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985) (simple reasonableness standard governs searches of students' persons and effects by public school authorities); *O'Connor* v. *Ortega*, 480 U.S. —, 94 L.Ed.2d 714 (1987) (reasonableness test for work-related searches of employees' offices by government employer). All of these cases are discussed *infra* under the general heading "Valid Searches and Seizures Without Warrants."

[4] *Illinois* v. *Gates*, 462 U.S. 213 (1983) (Justice Rehnquist's opinion of the Court was joined by Chief Justice Burger and by Justices Blackmun, Powell, and O'Connor. Justices Brennan, Marshall, and Stevens dissented.

The main defect of the two-part test, Justice Rehnquist concluded for the Court, was in treating an informant's reliability and his basis for knowledge as independent requirements. Instead, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." [5] In evaluating probable cause, "[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." [6]

— First Amendment Bearing on Probable Cause and Particularity

[P. 1176, add to N.4:]

These special constraints are inapplicable when obscene materials are purchased, and there is consequently no Fourth Amendment search or seizure. *Maryland* v. *Macon*, 472 U.S. 463 (1985).

[P. 1176, add to N.5:]

But cf. New York v. *P.J. Video, Inc.*, 475 U.S. 868, 875 n.6 (1986), rejecting the defendant's assertion, based on *Heller*, that only a single copy rather than all copies of allegedly obscene movies should have been seized pursuant to warrant.

[P. 1176, add to text following N.5:]

The Court has determined in *New York* v. *P.J. Video, Inc.*[7] that no higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. "Our reference in *Roaden* to a 'higher hurdle . . . of reasonableness' was not intended to establish a 'higher' standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the 'exigency' exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate who has 'focus[ed] searchingly on the question of obscenity.' " [8]

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[5] 462 U.S. at 213.
[6] 462 U.S. at 238.
[7] 475 U.S. 868 (1986).
[8] 475 U.S. at 875 n.6.

— Property Subject to Seizure

[P. 1178, add to text following N.19:]

However, some medically assisted bodily intrusions have been held impermissible, e.g., forcible administration of an emetic to induce vomiting,[9] and surgery under general anesthetic to remove a bullet lodged in a suspect's chest.[10] Factors to be weighed in determining which medical tests and procedures are reasonable include the extent to which the procedure threatens the individual's safety or health, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and the importance of the evidence to the prosecution's case.[11]

— Execution of Warrants

[P. 1181, add to text following N.19:]

Also, under some circumstances officers may search premises on the mistaken but reasonable belief that the premises are described in an otherwise valid warrant.[12]

Valid Searches and Seizures Without Warrants

— Detention Short of Arrest: Stop and Frisk

[P. 1184, add to N.16:]

United States v. *Hensley*, 469 U.S. 221 (1985) (reasonable suspicion to stop a motorist may be based on a "wanted flyer" as long as issuance of the flyer has been based on reasonable suspicion).

[P. 1185, add new paragraphs at end of section:]

The Court applied the *Mendenhall* reasonable perception standard in ruling that no seizure had occurred when police in a squad car drove alongside a suspect who had turned and run down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, display of a weapon, or blocking of the suspect's path), the Court concluded, the police conduct "would not have communicated to the reasonable person an at-

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[9] *Rochin* v. *California*, 342 U.S. 165 (1952).

[10] *Winston* v. *Lee*, 470 U.S. 753 (1985).

[11] *Winston* v. *Lee*, 470 U.S. 753, 761–63 (1985). Chief Justice Burger concurred on the basis of his reading of the Court's opinion "as not preventing detention of an individual if there are reasonable grounds to believe that natural bodily functions will disclose the presence of contraband materials secreted internally." *Id.*, at 767. *Cf. United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985).

[12] *Maryland* v. *Garrison*, 480 U.S. —, 94 L.Ed.2d 72 (1987) (officers reasonably believed there was only one "third floor apartment" in city row house when in fact there were two).

tempt to capture or otherwise intrude upon [one's] freedom of movement."[13]

A *Terry* search need not be limited to a stop and frisk of the person, but may extend as well to a protective search of the passenger compartment of a car if an officer possesses "a reasonable belief, based on specific and articulable facts . . . that the suspect is dangerous and . . . may gain immediate control of weapons."[14]

How lengthy a *Terry* detention may be varies with the circumstances. In approving a 20-minute detention of a driver made necessary by the driver's own evasion of drug agents and a state police decision to hold the driver until the agents could arrive on the scene, the Court indicated that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."[15]

The Court has now elaborated on the principles governing detention of luggage at airports in order to detect the presence of drugs, indicating that the *Terry* "limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause."[16] The general rule is that "when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* . . . would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope."[17] Seizure of luggage for an expeditious "canine sniff" by a dog trained to detect narcotics can satisfy this test even though seizure of luggage is in effect detention of the traveler, since the procedure results in "limited disclosure," impinges only slightly on a traveler's privacy interest in the contents of personal luggage, and does not constitute a search within the meaning of the Fourth Amendment.[18] By con-

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[13] *Michigan* v. *Chesternut*, 486 U.S. —, 100 L.Ed.2d 565, 573 (1988).

[14] *Michigan* v. *Long*, 463 U.S. 1032 (1983) (suspect appeared to be under the influence of drugs, officer spied hunting knife exposed on floor of front seat and searched remainder of passenger compartment).

[15] *United States* v. *Sharpe*, 470 U.S. 675, 686 (1985). A more relaxed standard has been applied to detention of travelers at the border, the Court testing the reasonableness in terms of "the period of time necessary to either verify or dispel the suspicion." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 544 (1985) (approving warrantless detention for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[16] *United States* v. *Place*, *462 U.S. 696, 709 (1983).*

[17] *United States* v. *Place*, *462 U.S. 696, 706 (1983).*

[18] 462 U.S. at 707. However, the search in *Place* was not expeditious, and hence exceeded Fourth Amendment bounds, when agents took 90 minutes to transport luggage to another airport for administration of the canine sniff.

trast, taking a suspect to an interrogation room on grounds short of probable cause, retaining his air ticket, and retrieving his luggage without his permission taints consent given under such circumstances to open the luggage, since by then the detention had exceeded the bounds of a permissible *Terry* investigative stop and amounted to an invalid arrest.[19] The same requirements for brevity of detention and limited scope of investigation are apparently inapplicable to border searches of international travelers, the Court having approved a 24-hour detention of a traveler suspected of smuggling drugs in her alimentary canal.[20]

— Search Incident to Arrest

[P. 1187, add to text following sentence containing N.7:]

But in spite of the holding in *Chadwick*, police may in the course of jailing an arrested suspect conduct an inventory search of the individual's personal effects, including the contents of a shoulder bag;[21] similarly, an inventory search of an impounded vehicle may include the contents of a closed container.[22]

— Vehicular Searches

[P. 1188, add to text following N.15:]

While motor homes do serve as residences and as repositories for personal effects, and while their contents are often shielded from public view, the Court has extended the automobile exception to them as well, holding that there is a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel, hence "readily mobile."[23]

[P. 1189, add to text following N.17:]

Once they have stopped a vehicle, police may also, based on articulable facts warranting a reasonable belief that weapons may be present, conduct a *Terry*-type protective search of those portions of the passenger compartment in which a weapon could be placed or

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[19] *Florida* v. *Royer*, 460 U.S. 491 (1983). On this much the plurality opinion of Justice White (*id.*, at 503), joined by three other Justices, and the concurring opinion of Justice Brennan (*id.*, at 509) were in agreement.

[20] *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985).

[21] *Illinois* v. *LaFayette*, 462 U.S. 640 (1983) (inventory search) (following *South Dakota* v. *Opperman*, 428 U.S. 364 (1976)).

[22] *Colorado* v. *Bertine*, 479 U.S. 367 (1987).

[23] *California* v. *Carney*, 471 U.S. 386, 393 (1985) (leaving open the question of whether the automobile exception also applies to a "mobile" home being used as a residence and not "readily mobile").

hidden.[24] And, in the absence of such reasonable suspicion as to weapons, police may seize contraband and suspicious items "in plain view" inside the passenger compartment.[25]

[P. 1189, add to N.20:]

Police, in conducting an inventory search of a vehicle, may open closed containers in order to inventory contents. *Colorado* v. *Bertine*, 479 U.S. 367 (1987).

[P. 1190, add to N.24:]

A *Ross* search of a container found in an automobile need not occur soon after its seizure. *United States* v. *Johns*, 469 U.S. 478 (1985) (three-day time lapse).

[P. 1190, add new section before Consent Searches:]

— Vessel Searches

Not only is the warrant requirement inapplicable to brief stops of vessels, but also none of the safeguards applicable to stops of automobiles on less than probable cause are necessary predicates to stops of vessels. In *United States* v. *Villamonte-Marquez*,[26] the Court upheld a random stop and boarding of a vessel by customs agents, lacking any suspicion of wrongdoing, for purpose of inspecting documentation. The boarding was authorized by statute derived from an act of the First Congress,[27] and hence had "an impressive historical pedigree" carrying with it a presumption of constitutionality. Moreover, "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" justify application of a less restrictive rule for vessel searches. The reason why random stops of vehicles have been held impermissible under the Fourth Amendment, the Court explained, is that stops at fixed checkpoints or roadblocks are both feasible and less subject to abuse of discretion by authorities. "But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time

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[24] *Michigan* v. *Long*, 463 U.S. 1032, 1049 (1983) (holding that contraband found in the course of such a search is admissible).

[25] *Texas* v. *Brown*, 460 U.S. 730 (1983). Similarly, since there is no reasonable privacy interest in the vehicle identification number, required by law to be placed on the dashboard so as to be visible through the windshield, police may reach into the passenger compartment to remove items obscuring the number and may seize items in plain view while doing so. *New York* v. *Class*, 475 U.S. 106 (1986).

[26] 462 U.S. 579 (1983). The opinion of the Court, written by Justice Rehnquist, was joined by Chief Justice Burger and by Justices White, Blackmun, Powell, and O'Connor. Justice Brennan's dissent was joined by Justice Marshall and, on mootness but not on the merits, by Justice Stevens.

[27] 19 U.S.C. § 1581(a), derived from § 31 of the Act of Aug. 4, 1790, 1 Stat. 164.

and need not follow established 'avenues' as automobiles must do."[28] Because there is a "substantial" governmental interest in enforcing documentation laws, "especially in waters where the need to deter or apprehend smugglers is great," the Court found the "limited" but not "minimal" intrusion occasioned by boarding for documentation inspection to be reasonable.[29] Dissenting Justice Brennan argued that the Court for the first time was approving "a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations whatever on the officers' discretion or any safeguards against abuse."[30]

— Consent Searches

[P. 1190, add to N.5:]

United States v. *Karo*, 468 U.S. 705 (1984) (installation of beeper with consent of informer who sold container with beeper to suspect is permissible with prior judicial approval, but use of beeper to monitor private residence is not).

— Border Searches

[P. 1191, add to text following N.9:]

Prolonged detention of travelers beyond the routine customs search and inspection may be justified by the *Terry* standard: reasonable suspicion having a particularized and objective basis.[31] However, *Terry* protections as to the length and intrusiveness of the search do not apply.[32]

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[28] 462 U.S. at 589. Justice Brennan's dissent argued that a fixed checkpoint was feasible in this case, involving a ship channel in an inland waterway. *Id.*, at 608 n.10. The fact that the Court's rationale was geared to the difficulties of law enforcement in the open seas suggests a reluctance to make exceptions to the general rule. Note as well the Court's later reference to this case as among those "reflect[ing] longstanding concern for the protection of the integrity of the border." *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

[29] 462 U.S. at 593.

[30] 462 U.S. at 598. Justice Brennan contended that all previous cases had required some "discretion-limiting" feature such as a requirement of probable cause, reasonable suspicion, fixed checkpoints instead of roving patrols, and limitation of border searches to border areas, and that these principles set forth in *Delaware* v. *Prouse* (main text p. 1189, n.17) should govern. Id. at 599, 601.

[31] *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985) (approving warrantless detention incommunicado for more than 24 hours of traveler suspected of alimentary canal drug smuggling).

[32] *Id.* Traveler suspected of alimentary canal drug smuggling was strip searched, and then given choice between abdominal x-ray or monitored bowel movement. Because the suspect chose the latter option, the court disavowed decision as to "what level of suspicion, if any, is required for . . . strip, body cavity, or involuntary x-ray searches." *Id.*, at 541 n.4.

[P. 1192, add to text following N.13:]

Once a shipping container has been opened by customs agents in a lawful border search, no protectable privacy interest is created by its resealing and delivery under police surveillance.[33]

— Open Fields

[P. 1192, add at end of section:]

The Court, invoking *Hester's* reliance on the literal wording of the Fourth Amendment and distinguishing *Katz*, has now ruled that the open fields exception applies to fields that are fenced and posted. "[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."[34] Nor may an individual demand privacy for activities conducted within outbuildings and visible by trespassers peering into the buildings from just outside.[35] Even within the curtilage and notwithstanding that the owner has gone to the extreme of erecting a 10-foot high fence in order to screen the area from ground-level view, there is no reasonable expectation of privacy from naked-eye inspection from navigable airspace.[36] And aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling.[37]

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[33] *Illinois* v. *Andreas*, 463 U.S. 765 (1983).

[34] *Oliver* v. *United States*, 466 U.S. 170, 178 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property). *See also California* v. *Greenwood*, 486 U.S. —, 100 L.Ed.2d 30 (1988) (approving warrantless search of garbage left curbside "readily accessible to animals, children, scavengers, snoops, and other members of the public").

[35] *United States* v. *Dunn*, 480 U.S. 294 (1987) (space immediately outside a barn, accessible only after crossing a series of "ranch-style" fences and situated one-half mile from the public road, constitutes unprotected "open field").

[36] *California* v. *Ciraolo*, 476 U.S. 207 (1986). Activities within the curtilage are nonetheless still entitled to some Fourth Amendment protection. The Court has described four considerations for determining whether an area falls within the curtilage: proximity to the home, whether the area is included within an enclosure also surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to shield the area from view of passersby. *United States* v. *Dunn*, 480 U.S. 294 (1987) (barn 50 yards outside fence surrounding home, used for processing chemicals, and separated from public access only by series of livestock fences, by chained and locked driveway, and by one-half mile's distance, is not within curtilage).

[37] *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986) (suggesting that aerial photography of the curtilage would be impermissible).

— "Plain View"

[P. 1192, add to N.16:]

Texas v. *Brown*, 460 U.S. 730 (1983) (contraband on car seat in plain view of officer who had stopped car and asked for driver's license); *New York* v. *Class*, 475 U.S. 106 (1986) (evidence seen while looking for vehicle identification number).

[P. 1193, add to text following N.17:]

The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them.[38]

The Court has analogized from the plain view doctrine to hold that once officers have lawfully observed contraband, "the owner's privacy interest in that item is lost," and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant.[39]

[P. 1193, add new sections preceding "Electronic Surveillance":]

— Public Schools

In *New Jersey* v. *T.L.O.*,[40] the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because "school officials act as representatives of the State, not merely as surrogates for the parents."[41] However, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."[42] Neither the warrant requirement nor the probable cause standard is appropriate, the Court ruled. Instead, a simple reasonableness standard governs all searches of students' persons and effects by school authorities.[43] A

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[38] *Arizona* v. *Hicks*, 480 U.S. 321 (1987) (police lawfully in apartment to investigate shooting lacked probable cause to inspect expensive stereo equipment to record serial numbers).

[39] *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983) (locker customs agents had opened, and which was subsequently traced). *Accord*, *United States* v. *Jacobsen*, 466 U.S. 109 (1984) (inspection of package opened by private freight carrier who notified drug agents).

[40] 469 U.S. 325 (1985).

[41] 469 U.S. at 336 (1984).

[42] 469 U.S. at 340.

[43] This single rule, the Court explained, will permit school authorities "to regulate their conduct according to the dictates of reason and common sense." 469 U.S. at 343. Rejecting the suggestion of dissenting Justice Stevens, the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules." *Id.*, at n.9.

search must be reasonable at its inception, i.e., there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[44] School searches must also be reasonably related in scope to the circumstances justifying the interference, and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[45] In applying these rules, the Court upheld as reasonable the search of a student's purse to determine whether the student, accused of violating a school rule by smoking in the lavatory, possessed cigarettes. The search for cigarettes uncovered evidence of drug activity held admissible in a prosecution under the juvenile laws.

— Government Offices

Similar principles apply to a public employer's work-related search of its employees' offices, desks, or file cabinets, except that in this context the Court distinguished searches conducted for law enforcement purposes. In *O'Connor* v. *Ortega*,[46] a majority of Justices agreed, albeit on somewhat differing rationales, that neither a warrant nor a probable cause requirement should apply to employer searches "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct."[47] Four Justices would require a case-by-case inquiry into the reasonableness of such searches;[48] one would hold that such searches "do not violate the Fourth Amendment."[49]

— Prisons and Regulation of Probation

Searches of prison cells by prison administrators are not limited even by a reasonableness standard, the Court having held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell."[50] Thus, prison administrators may conduct random "shakedown" searches of inmates' cells without the need to adopt any established practice or plan, and inmates must look to the Eighth Amendment or to state tort law for redress against harassment, malicious property destruction, and the like.

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[44] 469 U.S. at 342.

[45] *Id.*

[46] 480 U.S. —, 94 L.Ed.2d 714 (1987).

[47] 94 L.Ed.2d at 728. Not at issue was whether there must be individualized suspicion for investigations of work-related misconduct.

[48] This position was stated in Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and by Justices White and Powell.

[49] 94 L.Ed.2d at 728 (Scalia, J., concurring in judgment).

[50] *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984).

Neither a warrant nor probable cause is needed for an administrative search of a probationer's home. It is enough, the Court ruled in *Griffin* v. *Wisconsin*, that such a search was conducted pursuant to a valid regulation that itself satisfies the Fourth Amendment's reasonableness standard (e.g., by requiring "reasonable grounds" for a search).[51] "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." [52] "Probation, like incarceration, is a form of criminal sanction," the Court noted, and a warrant or probable cause requirement would interfere with the "ongoing [non-adversarial] supervisory relationship" required for proper functioning of the system.[53]

Electronic Surveillance and the Fourth Amendment

— The *Berger* and *Katz* Cases

[P. 1197, add to N.18:]

Two "beeper" decisions support the general applicability of the warrant requirement if electronic surveillance will impair legitimate privacy interests. *Compare United States* v. *Knotts*, 460 U.S. 276 (1983) (no Fourth Amendment violation in relying on a beeper, installed without warrant, to aid in monitoring progress of a car on the public roads, since there is no legitimate expectation of privacy in destination of travel on the public roads), with *United States* v. *Karo*, 468 U.S. 705 (1984) (beeper installed without a warrant may not be used to obtain information as to the continuing presence of an item within a private residence).

Enforcing the Fourth Amendment: The Exclusionary Rule

— Alternatives to the Exclusionary Rule

[P. 1201, add to text following N.8:]

More important, federal officers may now establish on motion for summary judgment that they are entitled to qualified immunity, based on an objectively reasonable belief that, under the circumstances of the case, a warrantless search later determined to violate the Fourth Amendment was supported by probable cause or exigent circumstances.[54]

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[51] 483 U.S. —, 97 L.Ed.2d 709 (1987) (search based on information from police detective that there was or might be contraband in probationer's apartment).

[52] 97 L.Ed.2d at 718.

[53] *Id.* at 718, 721.

[54] *Anderson* v. *Creighton*, 483 U.S. —, 97 L.Ed.2d 523 (1987). The dissenting Justices argued, inter alia, that such a principle is more appropriately applied as an affirmative defense, thereby allowing resolution of factual disputes prior to determining objective reasonableness of an officer's actions. 97 L.Ed.2d at 540–41

— The Critics of the Exclusionary Rule

[P. 1209, add to N.1:]

In *Segura* v. *United States*, 468 U.S. 796 (1984), evidence seized pursuant to warrant obtained after an illegal entry was admitted because there had been an independent basis for issuance of a warrant. This rule applies as well to evidence observed in plain view during the initial illegal search. *Murray* v. *United States*, 487 U.S. —, 101 L.Ed.2d 472 (1988). *See also United States* v. *Karo*, 468 U.S. 705 (1984) (excluding consideration of tainted evidence, there was sufficient untainted evidence in affidavit to justify finding of probable cause and issuance of search warrant).

[P. 1209, add to N.2:]

This aspect of *Torres* and *Ybarra* was to a large degree nullified by *Illinois* v. *Krull*, 480 U.S. 340 (1987), rejecting a distinction between substantive and procedural statutes and holding the exclusionary rule inapplicable in the case of a police officer's objectively reasonable reliance on a statute later held to violate the Fourth Amendment.

[P. 1210, add to N.4:]

Similarly, the rule is inapplicable in civil proceedings for deportation of aliens. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032 (1984).

[P. 1210, add at end of section:]

A "good faith" exception to the exclusionary rule has now been adopted by the Court. In *United States* v. *Leon*,[55] the Court created an exception for evidence obtained as a result of officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. It is unclear from the Court's analysis whether a majority of the Justices would also support a good-faith exception for evidence seized without a warrant.[56] Justice White's opinion for the Court [57] could find little benefit in

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(Stevens, J.). *See also Malley* v. *Briggs*, 475 U.S. 335, 345 (1986) (qualified immunity protects police officers who applied for a warrant unless "a reasonably well-trained officer in [the same] position would have known that his affidavit failed to establish probable cause and that he should not have applied for a warrant").

[55] 468 U.S. 897 (1984). The same objectively reasonable "good-faith" rule now applies in determining whether officers obtaining warrants are entitled to qualified immunity from suit. *Malley* v. *Briggs*, 475 U.S. 335 (1986).

[56] The whole thrust of analysis dealt with reasonableness of reliance on a warrant. The Court several times, however, used language broad enough to apply to warrantless searches as well. *See*, e.g., 468 U.S. at 909 (quoting Justice White's concurrence in *Illinois* v. *Gates*): "the balancing approach that has evolved . . . 'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment' "; and *Id.*, at 919: "[the rule] cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity."

[57] The opinion was joined by Chief Justice Burger, and by Justices Blackmun, Powell, Rehnquist, and O'Connor. Justice Blackmun also added a separate concurring opinion. Dissents were filed by Justice Brennan, joined by Justice Marshall, and by Justice Stevens.

applying the exclusionary rule where there has been good-faith reliance on an invalid warrant. Thus, there was nothing to offset the "substantial social costs exacted by the [rule]." [58] "The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," and in any event the Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates.[59] Moreover, the Court thought that the rule should not be applied "to deter objectively reasonable law enforcement activity," and that "[p]enalizing the officer for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations."[60] The Court also suggested some circumstances in which courts would be unable to find that officers' reliance on a warrant was objectively reasonable: if the officers have been "dishonest or reckless in preparing their affidavit," if it should have been obvious that the magistrate had "wholly abandoned" his neutral role, or if the warrant was obviously deficient on its face (e.g., lacking in particularity). The Court applied the *Leon* standard in *Massachusetts* v. *Sheppard*,[61] holding that an officer possessed an objectively reasonable belief that he had a valid warrant after he had pointed out to the magistrate that he had not used the standard form, and the magistrate had indicated that the necessary changes had been incorporated in the issued warrant.

The Court has extended *Leon* to hold that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held violative of the Fourth Amendment.[62] The Court reasoned that application of the exclusionary rule in such circumstances would have no more deterrent effect on officers than it would when officers reasonably rely on an invalid warrant, and no more deterrent effect on legislators who enact invalid statutes than on magistrates who issue invalid warrants.[63]

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[58] 468 U.S. at 907.

[59] 468 U.S. at 916–17.

[60] 468 U.S. at 919, 921.

[61] 468 U.S. 981 (1984).

[62] *Illinois* v. *Krull*, 480 U.S. 340 (1987). The same difficult-to-establish qualifications apply: there can be no objectively reasonable reliance "if, in passing the statute, the legislature wholly abandoned its responsibility to enact constitutional laws," or if "a reasonable officer should have known that the statute was unconstitutional." 94 L.Ed.2d at 378–79.

[63] Dissenting Justice O'Connor disagreed with this second conclusion, suggesting that the grace period "during which the police may freely perform unreasonable searches . . . creates a positive incentive [for legislatures] to promulgate unconstitutional laws," and that the Court's ruling "destroys all incentive on the part of individual criminal defendants to litigate the violation of their Fourth Amendment

rights" and thereby obtain a ruling on the validity of the statute. 94 L.Ed.2d at 385, 387.

FIFTH AMENDMENT

INDICTMENT BY GRAND JURY

[P. 1220, add to N.4:]

Ex parte Bain was overruled in *United States* v. *Miller*, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible.

[P. 1220, add to text following N.4:]

While additions to offenses alleged in an indictment are prohibited, the Court has now ruled that it is permissible "to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it," as, e.g., a lesser included offense.[1]

DOUBLE JEOPARDY

Development and Scope

[P. 1224, add to text following N.18:]

The dual sovereignty doctrine has now been applied to permit successive prosecutions by two states for the same conduct.[2]

[P. 1224, add to N.19:]

In determining whether a forfeiture proceeding is remedial or punitive, congressional preference for a civil sanction will be overridden only by "the clearest proof" to the contrary. *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984).

Reprosecution Following Acquittal

— Acquittal by the Trial Judge

[P. 1233, add to N.13:]

Smalis v. *Pennsylvania*, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

Reprosecution Following Conviction

— Reprosecution After Reversal on Defendant's Appeal

[P. 1237, add to N.9:]

But cf. Morris v. *Mathews*, 475 U.S. 237 (1986) (inadequate showing of prejudice resulting from reducing jeopardy-barred conviction for aggravated murder to non-

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[1] *United States* v. *Miller*, 471 U.S. 130, 144 (1985).

[2] *Heath* v. *Alabama*, 474 U.S. 82 (1985) (defendant crossed state line in course of kidnap murder, was prosecuted for murder in both states).

jeopardy-barred conviction for first degree murder). "To prevail in a case like this, the defendant must show that, but for the improper inclusion of the jeopardy-barred charge, the result of the proceeding probably would have been different." *Id.* at 247.

[P. 1237, add to N.11:]

Burks was distinguished in *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294 (1984), holding that a defendant who had elected to undergo a bench trial with no appellate review but with right of trial *de novo* before a jury (and with appellate review available) could not bar trial *de novo* and reverse his bench trial conviction by asserting that the conviction had been based on insufficient evidence. The two-tiered system in effect gave the defendant two chances at acquittal; under those circumstances jeopardy was not terminated by completion of the first entirely optional stage.

— Sentence Increases

[P. 1238, add to N.17:]

Bullington was followed in *Arizona* v. *Rumsey*, 467 U.S. 203 (1984), also involving a separate sentencing proceeding in which a life imprisonment sentence amounted to an acquittal on imposition of the death penalty. *Rumsey* was decided by 7–2 vote, with only Justices White and Rehnquist dissenting.

"For the Same Offence"

— Legislative Discretion as to Multiple Sentences

[P. 1239, add to text following N.3:]

The Court has now indicated that "[w]here a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial." [3]

[P. 1240, add to N.4:]

See also Garrett v. *United States*, 471 U.S. 773 (1985), holding that there was clear congressional intent in the framework of the statute and in legislative history that "continuing criminal enterprise" be a separate offense under the Comprehensive Drug Abuse Prevention and Control Act of 1970.

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[3] *Missouri* v. *Hunter*, 459 U.S. 359 (1983) (separate offenses of "first degree robbery," defined to include robbery under threat of violence, and "armed criminal action"). Only Justices Marshall and Stevens dissented, arguing that the legislature should not be totally free to prescribe multiple punishment for the same conduct, and that the same rules should govern multiple prosecutions and multiple punishments.

— Successive Prosecutions for "the Same Offence"

[P. 1241, add to N.14:]

And see Ohio v. *Johnson*, 467 U.S. 493 (1984) (trial court's acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution's objections does not bar subsequent prosecution on those "remaining" counts).

SELF-INCRIMINATION

Development and Scope

[P. 1246, add to N.15 following cite to *Wilson v. United States*:]

But the government may make no evidentiary use of the act of production in proceeding individually against the corporate custodian. *Braswell* v. *United States*, 487 U.S. —, 101 L.Ed.2d 98 (1988).

[P. 1246, add to end of N. 15:]

And cf. United States v. *Rylander*, 460 U.S. 752 (1983) (witness who had failed to appeal production order and thus had burden in contempt proceeding to show inability to then produce records could not rely on privilege to shift this evidentiary burden).

[P. 1246, add to text following N.16:]

Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature.[4]

[P. 1247, add to N.18:]

In *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the Court indicated as well that a State may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on absence of coercion, preferring not to apply the sometimes difficult distinction between testimonial and physical evidence.

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[4] *Allen* v. *Illinois*, 478 U.S. 364 (1986) (declaration that person is "sexually dangerous" under Illinois law is not a criminal proceeding); *Minnesota* v. *Murphy*, 465 U.S. 420, 435 n.7 (1984) (revocation of probation is not a criminal proceeding, hence "there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings"). In *Murphy*, the Court went on to explain that "a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake' . . . and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer . . . ." *Id.*

[P. 1247, add to N.19:]

A court order compelling a target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal is not testimonial in nature, the factual assertions being required of the banks and not of the target. *Doe* v. *United States*, 487 U.S. —, 101 L.Ed.2d 184 (1988). But in *United States* v. *Doe*, 465 U.S. 605 (1984), the Court distinguished *Fisher*, upholding lower courts' findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer's possession, and that they are authentic.

[P. 1247, add to N.20:]

See also South Dakota v. *Neville*, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect's refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); *Selective Service System* v. *Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

[P. 1248, add to N. 25:]

Carter v. *Kentucky* was applied in *James* v. *Kentucky*, 466 U.S. 341 (1983) (request for jury "admonition" sufficient to invoke right to "instruction").

[P. 1248, add as note to end of sentence containing N.25:]

While the *Griffin* rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, it does not apply to a prosecutor's "fair response" to a defense counsel's allegation that the government had denied his client the opportunity to explain his actions. *United States* v. *Robinson*, 485 U.S. —, 99 L.Ed.2d 23, 32 (1988).

[P. 1248, add to text following sentence containing N.25:]

Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.[5]

[P. 1248, add to N.1:]

The same principles apply to bar a prosecutor's use of *Miranda* silence as evidence of an arrestee's sanity. *Wainwright* v. *Greenfield*, 474 U.S. 284 (1986).

The Power to Compel Testimony and Disclosure

— Immunity

[P. 1254, add to N.18:]

Justice Department officials have the authority under the Act to decide whether to seek immunity, and courts will not apply "constructive" use immunity absent compliance with the statute's procedures. *United States* v. *Doe*, 465 U.S. 605 (1984).

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[5] *Chapman* v. *California*, 386 U.S. 18 (1967); *United States* v. *Hasting*, 461 U.S. 499 (1983).

[P. 1255, add to N. 21:]

Because use immunity is limited, a witness granted use immunity for grand jury testimony may validly invoke his Fifth Amendment privilege in a civil deposition proceeding when asked whether he had "so testified" previously, the deposition testimony not being covered by the earlier immunity. *Pillsbury Co.* v. *Conboy*, 459 U.S. 248 (1983).

Confessions

— State Confession Cases

[P. 1266, add to text following N.10:]

But a suspect's mental state alone—even insanity—is insufficient to establish involuntariness absent some coercive police activity.[6]

— Miranda v. Arizona

[P. 1274, add to N.23:]

See also Minnesota v. *Murphy*, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation).

[P. 1274, add to N.25:]

Berkemer v. *McCarty*, 468 U.S. 420, 440 (1984) (roadside questioning of motorist stopped for traffic violation is not custodial interrogation until his "freedom of action is curtailed to a 'degree associated with formal arrest' ").

[P. 1275, add to N.3:]

Similarly, the Court found no functional equivalent of interrogation when police allowed a suspect's wife to talk to him in the presence of a police officer who openly tape recorded the conversation. *Arizona* v. *Mauro*, 481 U.S. —, 95 L.Ed.2d 458 (1987).

[P. 1276, add to N.11:]

In *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. So too, an accused who expressed a willingness to talk to police, but who refused to make a written statement without presence of counsel, was held to have waived his rights with respect to his oral statements. *Connecticut* v. *Barrett*, 479 U.S. 523 (1987). The Court has held that *Edwards* should not be applied retroactively to a conviction that had become final, *Solem* v. *Stumes*, 465 U.S. 638 (1984), but that *Edwards* does apply to cases pending on appeal at the time it was decided. *Shea* v. *Louisiana*, 470 U.S. 51 (1985).

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[6] *Colorado* v. *Connelly*, 479 U.S. 157 (1986).

[P. 1276, add to N.12:]

Also, waivers signed by the accused following *Miranda* warnings are not vitiated by police having kept from the accused information that an attorney had been retained for him by a relative. *Moran* v. *Burbine*, 475 U.S. 412 (1986).

[P. 1277, add to N.17:]

A knowing and intelligent waiver need not be predicated on complete disclosure by police of the intended line of questioning, hence an accused's signed waiver following arrest for one crime is not invalidated by police having failed to inform him of intent to question him about another crime. *Colorado* v. *Spring*, 479 U.S. 564 (1987).

[P. 1277, add to N.18:]

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), the Court held that a confession following a *Miranda* warning is not necessarily tainted by an earlier confession obtained without a warning, as long as the earlier confession had been voluntary. *And see Moran* v. *Burbine*, 475 U.S. 412 (1986) (signed waivers following *Miranda* warnings not vitiated by police having kept from suspect information that attorney had been retained for him by relative).

[P. 1278, add to text at end of section:]

The Court has created a "public safety" exception to the *Miranda* warning requirement, but has refused to create another exception for misdemeanors and lesser offenses. In *New York* v. *Quarles*,[7] the Court held admissible a recently apprehended suspect's response in a public supermarket to the arresting officer's demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice Rehnquist,[8] declined to place officers in the "untenable position" of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that resulting evidence will be excluded at trial. While acknowledging that the exception itself will "lessen the desirable clarity of the rule," the Court predicted that confusion would be slight: "[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." [9] No such compelling justification

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[7] 467 U.S. 649 (1984).

[8] The Court's opinion was joined by Chief Justice Burger and by Justices White, Blackmun, and Powell. Justice O'Connor would have ruled inadmissible the suspect's response, but not the gun retrieved as a result of the response, and Justices Marshall, Brennan, and Stevens dissented.

[9] 467 U.S. at 658–59.

was offered for a *Miranda* exception for lesser offenses, however, and protecting the rule's "simplicity and clarity" counseled against creating one.[10] "[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." [11]

The Operation of the Exclusionary Rule

— Procedure in the Trial Courts

[P. 1281, add at end of sentence containing N.10:]

, or by clear and convincing evidence.[12]

DUE PROCESS

Procedural Due Process

— Aliens: Entry and Deportation

[P. 1292, add to N.6:]

Also, a collateral challenge must be permitted to the use of a deportation proceeding as an element of a criminal offense where effective judicial review of the deportation order has been denied. *United States* v. *Mendoza-Lopez*, 481 U.S. —, 95 L.Ed.2d 772 (1987).

Substantive Due Process

— Discrimination

[P. 1296, add to N.11 following *Richardson v. Belcher* citation:]

Lyng v. *Castillo*, 477 U.S. 635 (1986) (Food Stamp Act limitation of benefits to households of related persons who prepare meals together).

[P. 1297, add to N.13:]

Wayte v. *United States*, 470 U.S. 598 (1985) (selective prosecution of persons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection, there being no showing that these men were selected for prosecution because of their protest activities).

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[10] *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984).

[11] 468 U.S. at 434.

[12] *Colorado* v. *Connelly*, 479 U.S. 157 (1986).

— Retroactive Taxes

[P. 1303, add to N.13:]

Untermyer was distinguished in *United States* v. *Hemme*, 476 U.S. 558 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive.

— Deprivation of Property: Retroactive Legislation

[P. 1303, add to end of first paragraph in section:]

The Court has applied *Turner Elkhorn* in upholding retroactive application of pension plan termination provisions to cover the period of congressional consideration, declaring that the test for retroactive application of legislation adjusting economic burdens is merely whether "the retroactive application . . . is itself justified by a rational legislative purpose." [13]

[P. 1304, add to N.23:]

A different situation is presented where Congress has reserved the right to amend an agreement. *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (amendment of social security act to prevent termination by state when termination notice already filed).

NATIONAL EMINENT DOMAIN POWER

Public Use

[P. 1310, add to N.4:]

And see Hawaii Housing Auth. v. *Midkiff*, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

[P. 1313, add to text at end of section:]

Berman was applied in *Hawaii Housing Auth.* v. *Midkiff*,[14] upholding the Hawaii Land Reform Act as a "rational" effort to "correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly." Direct transfer of land from lessors to lessees was permissible, the Court held, there being no requirement "that government possess and use property at some point during a taking." [15] "The 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers," the Court concluded.[16]

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[13] *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

[14] 467 U.S. 229, 243 (1984).

[15] 467 U.S. at 243.

[16] 467 U.S. at 240. *See also Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a "conceivable public character").

Just Compensation

[P. 1314, add to N.6:]

Fair market value does not include the cost of "substitute" facilities. *United States* v. *50 Acres of Land*, 469 U.S. 24 (1984).

— Interest

[P. 1315, add to N.13:]

Kirby Forest Industries v. *United States*, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

[P. 1315, add to N.14:]

Kirby Forest Industries v. *United States*, 467 U.S. 1 (1984) (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

— Rights for Which Compensation Must Be Paid

[P. 1317, add to text following N.25:]

Trade secrets protected under state law are intangible property protected by the Taking Clause.[17] However, there was no property in a state's right to withdraw from the social security program when Congress had expressly reserved the right to amend the law and the agreement with the state.[18]

When Property Is Taken

— Police Power vs. Eminent Domain Power

[P. 1321, add to text following N.18:]

However, when presented 65 years later with a very similar restriction on coal mining, the Court upheld it in *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*.[19] Unlike its precursor, the Court

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[17] *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984).

[18] *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). So too, "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." *Bowen* v. *Gilliard*, 483 U.S. —, 107 S. Ct. 3008, 97 L.Ed.2d 485 (1987) (redefinition of family unit for purposes of calculating AFDC benefits).

[19] 480 U.S. 470, 107 S. Ct. 1232, 94 L.Ed.2d 472 (1987). The decision was 5–4. Justice Stevens' opinion of the Court was joined by Justices Brennan, White, Marshall, and Blackmun; Chief Justice Rehnquist's dissent was joined by Justices Powell, O'Connor, and Scalia.

explained, the newer law "does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners." [20] Instead, the state had identified "important public interests" (e.g., conservation, protection of water supplies, preservation of land values for taxation) and had broadened the law to apply regardless of whether the surface and mineral estates were in separate ownership. In these circumstances, the Court concluded, the fact "that private individuals erred in taking a risk cannot estop the State from exercising its police power. . . ." [21]

[P. 1323, add new paragraph following first full sentence on page:]

Since 1982 the Court has twice relied on the concept of "distinct (or "reasonable") investment-backed expectations" first introduced in *Penn Central.* In *Ruckelshaus* v. *Monsanto Co.*,[22] the Court used the concept to determine whether a taking had resulted from the government's disclosure of trade secret information submitted with applications for pesticide registrations. Disclosure of data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus "formed the basis of a reasonable investment-backed expectation," would have destroyed the property value of the trade secret and constituted a taking.[23] Following 1978 amendments setting forth conditions of data disclosure, however, applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.[24] Relying less heavily on the concept but rejecting an assertion that reasonable investment backed-expectations had been upset, the Court in *Connolly* v. *Pension Benefit Guaranty Corp.*[25] upheld retroactive imposition of liability for pension plan withdrawal on the basis that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits.

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[20] 94 L.Ed.2d at 488.

[21] Id. at 490.

[22] 467 U.S. 986 (1984).

[23] 467 U.S. at 1011.

[24] 467 U.S. at 1006–7. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against "unauthorized" disclosure. *Id.*, 1008–10.

[25] 475 U.S. 211 (1986).

[P. 1324, add to N.4:]

Loretto was distinguished in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987); regulation of the rates that utilities may charge cable companies for pole attachments does not constitute a taking in the absence of any requirement that utilities allow attachment and acquiesce in physical occupation of their property.

[P. 1325, add to N.11:]

See also United States v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) (permit requirement for filling wetlands is not a taking).

[P. 1325, add as note at end of paragraph continued from previous page]

The Court recently invoked the "public nuisance" label in upholding a coal subsidence law. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L.Ed.2d 472, 490 (1987) (fact "that private individuals erred in taking a risk cannot estop the State from exercising its police power to abate activity akin to a public nuisance").

[P. 1326, add as note to end of paragraph continued from previous page:]

Contrast *Hodel* v. *Irving*, 481 U.S. —, 107 S. Ct. 2076, 95 L.Ed.2d 668 (1987), where the Court found insufficient justification for a complete abrogation of the right to pass on to heirs interests in certain fractionated property.

[P. 1327, add to N. 18:]

United States v. *Locke*, 471 U.S. 84 (1984) (reasonable regulation of recordation of mining claim is not a taking).

[P. 1328, add to text at end of section:]

The Court followed Justice Brennan's lead in *First English Evangelical Lutheran Church* v. *County of Los Angeles*, holding that, when land use regulation is held to be a taking, compensation is due for the period of implementation prior to the holding.[26] The Court recognized that, even though government may elect in such circumstances to discontinue regulation and thereby avoid compensation for a permanent property deprivation, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." [27]

The first prong of the *Agins* test [28] for validity of zoning controls, virtually ignored to this point, was applied in *Nollan* v. *Cali-*

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[26] 482 U.S. —, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987). The decision was 6-3, Chief Justice Rehnquist's opinion of the Court being joined by Justices Brennan, White, Marshall, Powell, and Scalia, and Justice Stevens' dissent being joined in part by Justices Blackmun and O'Connor.

[27] 96 L.Ed.2d at 268.

[28] *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980). *See* main text, p. 1327 n.18.

fornia Coastal Commission.[29] There the Court held that extraction of a public access easement across a strip of beach as a condition for a permit to enlarge a beachfront home did not "substantially advance" the state's legitimate interest in preserving public view of the beach from the street in front of the lot. The easement instead was designed to allow the public to walk back and forth along the beach between two public beaches. "[U]nless the permit condition serves the same governmental purpose as the development ban," the Court concluded, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" [30] The future importance of *Nollan* will depend in large measure on how broadly its principles are applied. Unlimited application of a substantial advancement test could herald decreased deference to legislative judgments as to appropriate regulation of property, and a resurrection of substantive due process analysis.[31] Confined to its holding, however, *Nollan* may be relatively unexceptional. The Court's frame of reference was that requiring a property owner to convey outright a public easement across his property would ordinarily and undeniably constitute a taking; the question posed was "whether requiring [the easement] to be conveyed as a condition for issuing a land use permit alters the outcome." [32] However, for many conditions attached to permits (e.g., building code requirements relating to safety, quality of materials, or soundness of construction) the starting point is different: these conditions do not stand alone. And, even where *Nollan* issues apparently could be raised (as, e.g., with respect to requirements that subdivision developers dedicate land for recreation needs generated by their developments), it may often be possible to establish that the condition "substantially advances" the same legitimate governmental purpose served by the permit requirement.[33] Important to *Nollan's* ap-

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[29] 483 U.S. —, 107 S. Ct. 3141, 97 L.Ed.2d 677 (1987).

[30] 97 L.Ed.2d at 689.

[31] Dissenting Justice Brennan argued that the Court was requiring "a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a state's exercise of its police power for the welfare of its citizens." 97 L.Ed.2d at 693. Justice Scalia's opinion for the Court denied that the standards "are the same as those applied to due process or equal protection claims," indicating further that "a broad range of governmental purposes and regulations satisfies these requirements." *Id.* at 688 n.3, 688. For analysis, *see* N. Lawrence, "Means, Motives, and Takings: The Nexus Test of *Nollan* v. *California Coastal Commission*," 12 Harv. Envtl. L. Rev. 231 (1988).

[32] *Id.* at 687.

[33] Justice Scalia, author of the Court's opinion in *Nollan*, amplified his views in a concurring and dissenting opinion in *Pennell* v. *City of San Jose*, 485 U.S. —, 108 S. Ct. 849, 99 L.Ed.2d 1 (1988), explaining that "common zoning regulations requiring subdividers to observe lot-size and set-back restrictions, and to dedicate certain areas to public streets, are in accord with [constitutional requirements] because the

plication will be how narrowly or how broadly a reviewing court is willing to construe the public interests underlying the regulation of property.[34]

In spite of *First English* and *Nollan*, considerable obstacles remain for future litigants challenging regulatory restrictions on land use. As suggested above, regulatory takings will most likely remain difficult to establish in spite of *Nollan*. And even if a taking can be established, the Court cautioned in *First English* that its holding was limited "to the facts presented [a taking was assumed] and [did] not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like."[35] Failure to incur such delays can result in a holding that a taking claim is premature. In *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*,[36] for example, the landowner had failed to seek a variance following a planning commission's rejection of a subdivision plat, and had failed to pursue state inverse condemnation procedures. Similarly, in *MacDonald, Sommer & Frates* v. *County of Yolo*,[37] the landowner had failed to obtain a "final and authoritative determination of the type and intensity of development legally permitted on the . . . property. As the Court explained, "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." So too, a challenge to a municipal rent control ordinance was considered "premature" in the absence of evidence that a tenant hardship provision had in fact ever been applied to reduce what would otherwise be considered to be a reasonable rent increase.[38]

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proposed property use would otherwise be the cause of" the social evil (e.g., congestion) that the regulation seeks to remedy. By contrast, the Justice asserted, a rent control restriction pegged to individual tenant hardship lacks such cause-and-effect relationship and is in reality an attempt to impose on a few individuals public burdens that "should be borne by the public as a whole." 99 L.Ed.2d at 20–21.

[34] *Compare Pioneer Trust and Savings Bank* v. *Village of Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961) (required dedication of land for school and playground is invalid as resulting from the total development of the community, rather than being specifically and uniquely attributable to the developer's activity) *with Associated Home Builders* v. *City of Walnut Creek*, 94 Cal. Rptr. 630, 484 P.2d 606, 610 (1971) (exaction can be justified on the basis of "general public need for recreational facilities caused by present and future subdivisions"). The *Nollan* Court cited the *Mount Prospect* case approvingly, while contrasting the California rule. 97 L.Ed.2d at 691.

[35] 96 L.Ed.2d at 268.

[36] 473 U.S. 172 (1985).

[37] 477 U.S. 340 (1986).

[38] *Pennell* v. *City of San Jose*, 485 U.S. —, 99 L.Ed.2d 1, 108 S. Ct. 849 (1988).

SIXTH AMENDMENT

Right to a Speedy and Public Trial

— Speedy Trial

[P. 1333, add to N.6:]

Marion and *MacDonald* were applied in *United States* v. *Loud Hawk*, 474 U.S. 302 (1986), holding the speedy trial guarantee inapplicable to the period during which the government appealed dismissal of an indictment, since during that time the suspect had not been subject to bail or otherwise restrained.

[P. 1335, add to text following N.16:]

Delays caused by the prosecution's interlocutory appeal will be judged by the Barker factors, of which the second—the reason for the appeal—is the most important.[1]

— Public Trial

[P. 1337, add to text following N.6:]

The Court has borrowed from First Amendment cases in protecting the right to a public trial. Closure of trials or pretrial proceedings over the objection of the accused may be justified only if the state can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." [2] In *Waller* v. *Georgia*,[3] the Court held that an accused's Sixth Amendment rights had been violated by closure of all 7 days of a suppression hearing in order to protect persons whose phone conversations had been taped, when less than 2 and 1/2 hours of the hearing had been devoted to playing the tapes. The need for openness at suppression hearings "may be particularly strong," the Court indicated, due to the fact that the conduct of police and prosecutor is often at issue.[4] However, an ac-

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[1] *United States* v. *Loud Hawk*, 474 U.S. 302 (1986) (no denial of speedy trial, since prosecution's position on appeal was strong, and there was no showing of bad faith or dilatory purpose). If the interlocutory appeal is taken by the defendant, he must "bear the heavy burden of showing an unreasonable delay caused by the prosecution [or] wholly unjustifiable delay by the appellate court" in order to win dismissal on speedy trial grounds. *Id.* at 316.

[2] *Press-Enterprise Co.* v. *Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*).

[3] 467 U.S. 39 (1984).

[4] *Waller* v. *Georgia*, 467 U.S. 39, 47 (1984) (indicating that the *Press-Enterprise I* standard governs such 6th Amendment cases).

cused's Sixth Amendment-based request for closure must meet the same stringent test applied to governmental requests to close proceedings: there must be "specific findings . . . demonstrating that first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." [5]

Right to Trial by Impartial Jury

— Impartial Jury

[P. 1344, add to text following N. 5:]

The requirement applies only to jury panels or venires from which petit juries are chosen, and not to the composition of the petit juries themselves.[6]

[P. 1345, add to N.11:]

Patton v. *Yount*, 467 U.S. 1025 (1984).

[P. 1346, add to text following N.18:]

The proper standard for exclusion is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " [7] Thus the juror need not indicate that he would "automatically" vote against the death penalty, and his "bias [need not] be proved with 'unmistakable clarity.' " [8] Persons properly excludable under *Witherspoon* may also be excluded from the guilt/innocence phase of a bifurcated capital trial.[9] It had been argued that to exclude such persons from the guilt/innocence phase would result in a jury somewhat more predisposed to convict, and that this would deny the defendant a jury chosen from a fair cross-section. The Court rejected this, concluding that "it is simply not possible to define jury impartiality . . . by reference to some hypothet-

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[5] *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 14 (1986) (*Press-Enterprise II*).

[6] *Lockhart* v. *McCree*, 476 U.S. 162 (1986). "We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 476 U.S. at 173.

[7] *Wainwright* v. *Witt*, 469 U.S. 412, 424 (1985), quoting *Adams* v. *Texas*, 448 U.S. 38, 45 (1980).

[8] *Wainwright* v. *Witt*, 469 U.S. at 424. *Accord*, *Darden* v. *Wainwright*, 477 U.S. 168 (appropriateness of exclusion should be determined by context, including excluded juror's understanding based on previous questioning of other jurors).

[9] *Lockhart* v. *McCree*, 476 U.S. 162 (1986).

ical mix of individual viewpoints." [10] Moreover, the state has "an entirely proper interest in obtaining a single jury that could impartially decide all of the issues in [a] case," and need not select separate panels and duplicate evidence for the two distinct but interrelated functions.[11] For the same reasons, there is no violation of the right to an impartial jury if a defendant for whom capital charges have been dropped is tried, along with a codefendant still facing capital charges, before a "death qualified" jury.[12]

Exclusion of one juror qualified under *Witherspoon* constitutes reversible error, and the exclusion may not be subjected to harmless error analysis.[13] However, a court's error in refusing to dismiss for cause a prospective juror prejudiced in favor of the death penalty does not deprive a defendant of his right to trial by an impartial jury if he is able to exclude the juror through exercise of a peremptory challenge.[14] The relevant inquiry is "on the jurors who ultimately sat," the Court declared, rejecting as overly broad the assertion in *Gray* that the focus instead should be on " 'whether the composition of the jury panel as a whole could have been affected by the trial court's error.' " [15]

[P. 1347, add to text following N.22]

An exception is made for capital trials, where the risk of racial prejudice "is especially serious in light of the complete finality of the death sentence." A defendant accused of an interracial capital offense is entitled to have prospective jurors informed of the victim's race and questioned as to racial bias.[16]

[P. 1347, add to text following N.25:]

Presumably excluding cases of racial or invidious discrimination, "peremptory challenges are not of constitutional dimension." In the Sixth Amendment context, "peremptory challenges are a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." [17]

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[10] 476 U.S at 183.

[11] *Id.* at 180.

[12] *Buchanan* v. *Kentucky*, 483 U.S. —, 97 L.Ed.2d 336 (1987).

[13] *Gray* v. *Mississippi*, 481 U.S. —, 95 L.Ed.2d 622 (1987).

[14] *Ross* v. *Oklahoma*, 487 U.S. —, 101 L.Ed.2d 80 (1987).

[15] *Ross* v. *Oklahoma*, 487 U.S. —, 101 L.Ed.2d 80, 88, 89 (1987).

[16] *Turner* v. *Murray*, 476 U.S. 28 (1986). The quote is from a section of Justice White's opinion not adopted as opinion of the Court. *Id.*, at 35.

[17] *Ross* v. *Oklahoma*, 487 U.S. —, 101 L.Ed.2d 80, 90. Similarly, there is no due process violation, at least where state statutory law requires use of peremptory chal-

Confrontation

[P. 1352, add to N.14:]

Bruton was held inapplicable, however, when the nontestifying codefendant's confession was redacted to omit any reference to the defendant, and was circumstantially incriminating only as the result of other evidence properly introduced. *Richardson* v. *Marsh*, 481 U.S. —, 95 L.Ed.2d 176 (1987).

[P. 1352, add to N.15:]

The former approach was rejected in favor of the latter in *Cruz* v. *New York*, 481 U.S. —, 95 L.Ed.2d 162 (1987). The appropriate focus is on reliability, the Court indicated, and "the defendant's confession may be considered at trial in assessing whether his codefendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him (assuming the 'unavailability of the codefendant' despite the lack of opportunity for cross-examination." 95 L.Ed.2d at 172.

[P. 1352, add to text following N.15:]

The Court continues to view as "presumptively unreliable accomplices' confessions that incriminate defendants." [18]

[P. 1353, add to N.16:]

See also United States v. *Inadi*, 475 U.S. 387 (1986).

[P. 1353, add to N.18:]

"The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination." *Delaware* v. *Fensterer*, 474 U.S. 15, 21-22 (1985) (per curiam) (expert witness testified as to conclusion, but could not remember basis for conclusion). *See also United States* v. *Owens*, 484 U.S. —, 98 L.Ed.2d 951 (1988) (testimony as to previous, out-of-court identification statement is not barred by witness' inability, due to memory loss, to explain the basis for his identification).

[P. 1354, add to N.20:]

The Clause protects defendants against use of substantive evidence against them, but does not bar rebuttal of the defendant's own testimony. *Tennessee* v. *Street*, 471 U.S. 409 (1985) (use of accomplice's confession not to establish facts as to defendant's participation in the crime, but instead to support officer's rebuttal of defendant's testimony as to circumstances of defendant's confession; presence of officer assured right of cross-examination).

[P. 1355, add to N.23:]

The fact that defendant's and codefendant's confessions "interlocked" on a number of points was not a sufficient indicium of reliability under *Roberts*, since the

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lenges to cure erroneous refusals by the court to excuse jurors for cause. "It is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise." *Id.*

[18] *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986).

confessions diverged on the critical issues of the respective roles of the two defendants. *Lee* v. *Illinois*, 476 U.S. 530 (1986).

[P. 1355, add to text following N.23:]

Roberts was narrowed in *United States* v. *Inadi*,[19] holding that the rule of "necessity" is confined to use of testimony from a prior judicial proceeding, and is inapplicable to co-conspirators' out-of-court statements. The latter—at least those "made while the conspiracy is in progress"—have "independent evidentiary significance of [their] own"; hence in-court testimony is not a valid substitute.[20]

Resting on "the irreducible literal meaning of the clause," and tracing its lineage "to the beginnings of Western legal culture" is a defendant's right during his trial to face-to-face confrontation with his accusers.[21] In *Coy* v. *Iowa*,[22] the Court held that this right is violated by a procedure, authorized by statute, placing a one-way screen between complaining child witnesses and the defendant, thereby sparing the witnesses from viewing the defendant. The Court's opinion by Justice Scalia squarely rejected the Wigmore view "that the only essential interest preserved by the right was cross-examination."[23] The defendant's rights were held to have been violated even though the witnesses could be viewed by the defendant's counsel and by the judge and jury, even though the right of cross-examination was in no way limited, and even though the state asserted a strong interest in protecting child sex-abuse victims from further trauma.[24] However, there is no right of face-to-face confrontation at a competency hearing, as long as applicable procedures do not restrict the right to confront and cross-examine the witnesses at trial.[25]

Compulsory Process

[P. 1355, add to end of section:]

The right to present witnesses is not absolute, however; a court may refuse to allow a defense witness to testify when the court finds that defendant's counsel willfully failed to identify the witness in a pretrial discovery request and thereby attempted to gain a tactical advantage.[26]

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[19] 475 U.S. 387 (1986).

[20] 475 U.S. at 394-95.

[21] *Coy* v. *Iowa*, 487 U.S. —, 101 L.Ed.2d 857, 867, 863 (1988).

[22] 487 U.S. —, 101 L.Ed.2d 857 (1988).

[23] 101 L.Ed.2d at 865 n.2.

[24] On this latter point, the Court indicated that only "individualized findings," rather than statutory presumption, could suffice to create an exception to the rule. 101 L.Ed.2d at 867.

[25] *Kentucky* v. *Stincer*, 482 U.S. —, 96 L.Ed.2d 631 (1987).

[26] *Taylor* v. *Illinois*, 484 U.S. —, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988).

In *Pennsylvania* v. *Ritchie*, the Court indicated that requests to compel the government to reveal the identity of witnesses or produce exculpatory evidence should be evaluated under due process rather than compulsory process analysis, adding that "compulsory process provides no greater protections in this area than due process." [27]

Assistance of Counsel

— Effective Assistance of Counsel

[P. 1363, add to N.17:]

Wheat v. *United States*, 486 U.S. —, 100 L.Ed.2d 140 (1988) (district court correctly denied defendant's waiver of right to conflict-free representation; separate representation order is justified by likelihood of attorney's conflict of interest).

[P. 1364, add new paragraph to end of section:]

In *Strickland* v. *Washington*,[28] the Court articulated the test for ineffective assistance of counsel in criminal trials or in capital sentencing proceedings.[29] There are two components to the test: deficient attorney performance and prejudice to the defense so serious as to bring the outcome of the proceeding into question. Although the gauge of effective attorney performance is an objective standard of reasonableness, the Court concluded that "[j]udicial scrutiny of counsel's performance must be highly deferential." Strategic choices made after thorough investigation of relevant law and facts are "virtually unchallengeable," as are "reasonable" decisions making investigation unnecessary.[30] In order to establish prejudice resulting from attorney error, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been dif-

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[27] 480 U.S. 39 (1987) (ordering trial court review of files of child services agency to determine whether they contain evidence material to defense in child abuse prosecution).

[28] 466 U.S. 668 (1984).

[29] *Strickland* involved capital sentencing, and the Court left open the issue of what standards might apply in ordinary sentencing, where there is generally far more discretion than in capital sentencing or in the guilt/ innocence phase of a capital trial. 466 U.S. at 686.

[30] 466 U.S. at 689–91. The obligation is to stay within the wide range of legitimate, lawful, professional conduct; there is no obligation to assist the defendant in presenting perjured testimony. *Nix* v. *Whiteside*, 475 U.S. 157 (1986). Also, "effective" assistance of counsel does not guarantee the accused a "meaningful relationship" of "rapport" with his attorney such that he is entitled to a continuance in order to change attorneys during a trial. *Morris* v. *Slappy*, 461 U.S. 1 (1983). *See also Jones* v. *Barnes*, 463 U.S. 745 (1983) (no obligation to present on appeal all nonfrivolous issues requested by defendant; appointed counsel may exercise his professional judgement in determining which issues are best raised on appeal).

ferent. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [31] In *Strickland,* neither part of the test was satisfied. The attorney's decision to forego character and psychological evidence in the capital sentencing proceeding in order to avoid evidence of the defendant's criminal history was deemed "the result of reasonable professional judgment," and prejudice could not be shown because "the overwhelming aggravating factors" outweighed whatever evidence of good character could have been presented.[32] In *Hill* v. *Lockhart,*[33] the Court applied the *Strickland* test to attorney decisions in plea bargaining, holding that a defendant must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.

There are times when prejudice may be presumed, i.e. there can be "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." [34] These situations include actual or constructive denial of counsel, and denial of such basics as the right to effective cross-examination. However, "[a]part from circumstances of that magnitude . . . there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice]." [35]

— Self-Representation

[P. 1364, add to N. 21:]

Related to the right of self-representation is the right to testify in one's own defense. *Rock* v. *Arkansas,* 483 U.S. —, 97 L.Ed.2d 37 (1987).

[P. 1364, add to end of section:]

The essential elements of self-representation were spelled out in *McKaskle* v. *Wiggins,*[36] a case involving the self-represented defendant's rights vis-a-vis "standby counsel" appointed by the trial court. The "core of the *Faretta* right" is that the defendant "is entitled to preserve actual control over the case he chooses to present to the jury," and consequently, standby counsel's participation "should not be allowed to destroy the jury's perception that the defendant is representing himself." [37] Participation of standby coun-

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[31] 466 U.S. at 694.

[32] 466 U.S. at 699. *Accord, Darden* v. *Wainwright,* 477 U.S. 168 (1986) (decision not to introduce mitigating evidence).

[33] 474 U.S. 52 (1985).

[34] *United States* v. *Cronic,* 466 U.S. 648, 658 (1984).

[35] 466 U.S. at 659 n.26 (finding no inherently prejudicial circumstances in appointment of real estate attorney with no criminal law experience to defend mail fraud "check kiting" charges with approximately one month's preparation time).

[36] 465 U.S. 168 (1984).

[37] 465 U.S. at 178.

sel even in the jury's presence and over the defendant's objection does not violate the defendant's Sixth Amendment rights when serving the basic purpose of aiding the defendant in complying with routine courtroom procedures and protocols and thereby relieving the trial judge of these tasks.[38]

— Right to Assistance of Counsel in Nontrial Situations

— Custodial Interrogation

[P. 1366, add new paragraph to text at end of section:]

[1]The Court has extended the *Edwards* v. *Arizona*[39] rule protecting in-custody requests for counsel to post-arraignment situations where the right derives from the Sixth Amendment rather than the Fifth. Thus, "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid."[40] The Court concluded that "the reasons for prohibiting the interrogation of an uncounseled prisoner who has asked for the help of a lawyer are even stronger after he has been formally charged with an offense than before."[41] The remedy for violation of this rule is exclusion from evidence of statements so obtained.[42] And, while the basis for the Sixth Amendment exclusionary rule—to protect the right to a fair trial—differs from that of the Fourth Amendment rule—to deter illegal police conduct—exceptions to the Fourth Amendment's exclusionary rule can apply as well to the Sixth. In *Nix* v. *Williams*,[43] the Court held the "inevitable discovery" exception applicable to defeat exclusion of evidence obtained as a result of an interrogation violating the accused's Sixth Amendment rights. "Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial."[44]

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[38] 465 U.S. at 184.

[39] 451 U.S. 477 (1981).

[40] *Michigan* v. *Jackson*, 475 U.S. 625, 636 (1986). The rule bars questioning stemming from a separate investigation as well as questioning relating to the crime for which suspect was arrested. *Arizona* v. *Roberson*, 108 S. Ct. 2093, 100 L.Ed.2d 704 (1988).

[41] 475 U.S. at 631. If a prisoner does not ask for the assistance of counsel, however, and voluntarily waives his rights following a *Miranda* warning, these reasons disappear. Moreover, although the right to counsel is more difficult to waive at trial than before trial, "whatever standards suffice for *Miranda*'s purposes will also be sufficient [for waiver of Sixth Amendment rights] in the context of postindictment questioning." *Patterson* v. *Illinois*, 487 U.S. —, 101 L.Ed.2d 261, 276 (1988).

[42] *See Michigan* v. *Jackson*, 475 U.S. 625 (1986).

[43] 467 U.S. 431 (1984).

[44] 467 U.S. at 446.

— Lineups and Other Identification Situations

[P. 1368, add to N.21:]

Constructive notice is insufficient to alert counsel to psychiatric examination to assess future dangerousness of an indicted client. *Satterwhite* v. *Texas*, 486 U.S. —, 100 L.Ed.2d 284 (1987) (also subjecting *Estelle* v. *Smith* violations to harmless error analysis in capital cases).

[P. 1369, add to N.25:]

Similarly, there is no right to counsel for prison inmates placed under administrative segregation during a lengthy investigation of their participation in prison crimes. *United States* v. *Gouveia*, 467 U.S. 180 (1984).

[P. 1369, add to N.1:]

United States v. *Gouveia*, 467 U.S. 180 (1984) (Sixth Amendment attaches as of arraignment).

SEVENTH AMENDMENT

Application of the Amendment

— Cases "at Common Law"

[P. 1377, add to text following N.4:]

The amendment requires trial by jury to determine liability for civil penalties under the Clean Water Act, but not to assess the amount of penalty, the Court ruled in *Tull* v. *United States.*[1] While analogies could be drawn to 18th Century actions in equity to abate a public nuisance as well as to actions in debt within the jurisdiction of the law courts, the Court explained that the type of relief sought is more important than such analogies. The penal nature of the Clean Water Act civil penalty remedy distinguishes it from restitution-based remedies available in equity courts, and therefore makes it a remedy of the type that could be imposed only by courts of law.[2] On the other hand, a jury need not necessarily determine the remedy in a trial in which it must determine liability. Because the Court viewed assessment of the amount of penalty as involving neither the "substance" nor a "fundamental element" of a common-law right to trial by jury, it held permissible the Act's assignment of that task to the trial judge.

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[1] 481 U.S. —, 95 L.Ed.2d 365 (1987).

[2] The statute itself specified only a maximum amount for the penalty; the Court derived its "punitive" characterization from indications in legislative history that Congress desired consideration of the need for retribution and deterrence as well as the need for restitution.

EIGHTH AMENDMENT

Excessive Bail

[P. 1392, add to N.21 following cite to *Stack v. Boyle*]

This dictum has now been limited to situations in which the amount of bail is excessive in relation to the governmental objective of assuring presence of the arrestee at trial; it has no application when bail is denied altogether or when some other governmental objective is implemented. *United States* v. *Salerno*, 481 U.S. —, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1988).

[P. 1392, add to N.22:]

In *Schall* v. *Martin*, 467 U.S. 253 (1984), the Court tested and upheld under the Due Process Clause of the Fourteenth Amendment a state statute providing for preventive detention of juveniles.

[P. 1392, add to text following N.22:]

In *United States* v. *Salerno*[1] the Court upheld application of preventive detention provisions of the Bail Reform Act of 1984 against facial challenge under the Eight Amendment. The function of bail, the Court explained, is limited neither to preventing flight of the defendant prior to trial nor to safeguarding a court's role in adjudicating guilt or innocence. "[W]e reject the proposition that the Eighth Amendment categorically prohibits the government from pursuing other admittedly compelling interests through regulation of pretrial release." [2] Instead, "the only arguable substantive limitation of the Bail Clause is that the government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil." [3] Detention pending trial of "arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel" satisfies this requirement. [4]

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[1] 481 U.S. —, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1988).

[2] 95 L.Ed.2d at 712–13.

[3] *Id.* at 713.

[4] *Id.* at 714. The Court also ruled that there was no violation of Due Process, the governmental objective being legitimate and there being a number of procedural safeguards (it applies only to serious crimes, the arrestee is entitled to a prompt hearing, the length of detention is limited, and detainees must be housed apart from criminals).

Cruel and Unusual Punishments

— Capital Punishment

[P. 1395, add to N.16 following *Adams v. Texas citation*:]

Wainwright v. *Witt*, 469 U.S. 412 (1985); *Lockhart* v. *McCree*, 476 U.S. 162 (1986).

[P. 1400, add to N.7:]

The issue has now been decided, the Court again striking down a mandatory sentencing provision. *Sumner* v. *Shuman*, 483 U.S. —, 107 S. Ct. 2716, 97 L.Ed.2d 56 (1987) (provision under which a prison inmate convicted of murder while serving a life sentence without possibility of parole is automatically sentenced to death is invalid as preventing the sentencing authority from considering as mitigating factors aspects of a defendant's character or record). If actual sentencing authority is conferred on the trial judge, however, it is not unconstitutional for a statute to require a jury to return a death "sentence" upon convicting for specified crimes. *Baldwin* v. *Alabama*, 472 U.S. 372 (1985) (mandatory jury death sentence saved by requirement that trial judge independently weigh aggravating and mitigating factors and determine sentence).

[P. 1400, add to N.9:]

The issue was decided in *Spaziano* v. *Florida*, 468 U.S. 447 (1984), upholding a provision under which the judge can override a jury's advisory life imprisonment sentence and impose the death sentence. "[T]he purpose of the death penalty is not frustrated by, or inconsistent with, a scheme in which the imposition of the penalty in individual cases is determined by a judge." *Id.*, at 462-63.

[P. 1401, add to N.11:]

A further protection against jury bias was added by the Court's holding in *Turner* v. *Murray*, 476 U.S. 28, 36-37 (1986): "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias."

[P. 1401, add to N.12:]

Appellate review under a harmless error standard can preserve a death sentence based in part on a jury's consideration of an aggravating factor later found to be invalid, *Zant* v. *Stephens*, 462 U.S. 862 (1983), or on a trial judge's consideration of improper aggravating circumstances. *Barclay* v. *Florida*, 463 U.S. 954 (1983). In each case the sentencing authority had found other aggravating circumstances justifying imposition of capital punishment to be present, and in the former evidence relating to the invalid factor was nonetheless admissible. By contrast, where there is a possibility that a jury's reliance on a "totally irrelevant" factor (defendant had served time pursuant to an invalid conviction subsequently vacated) may have been decisive in balancing aggravating and mitigating factors, a death sentence may not stand in spite of the presence of other aggravating factors. *Johnson* v. *Mississippi*, 486 U.S. —, 108 S. Ct. 1981, 100 L.Ed.2d 575 (1988). The Court has now held that there is no constitutional requirement that state appellate courts determine whether death sentences are proportionate with sentences imposed on others convicted of the same crime. *Pulley* v. *Harris*, 465 U.S. 37 (1984). *Gregg*, *Profitt*, and *Jurek* did not require such comparative proportionality review, the Court noted, but merely suggest that proportionality review may be one means by which a state may "safeguard against arbitrarily imposed death sentences." 465 U.S. at 50.

[P. 1401, add to N.13 following *Godfrey v. Georgia* citation:]

Maynard v. *Cartwright*, 486 U.S. —, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988).

[P. 1401, add to N.13 following *Jurek v. Texas* citation:]

Testimony of psychiatrists need not be based on examination of the defendant; general responses to hypothetical questions may also be admitted. *Barefoot* v. *Estelle*, 463 U.S. 880 (1983).

[P. 1401, add to end of N.13:]

No such constitutional infirmity is present, however, if failure to instruct on lesser included offenses is due to the defendant's refusal to waive the statute of limitations for those lesser offenses. *Spaziano* v. *Florida*, 468 U.S. 447 (1984). A state may not sanction prosecutor's comments or jury instructions that mislead a jury as to its primary responsibility for deciding whether to impose the death penalty. *Compare Caldwell* v. *Mississippi*, 472 U.S. 320 (1985) (jury's responsibility is undermined by court-sanctioned remarks by prosecutor that jury's decision is not final, but is subject to appellate review) *with California* v. *Ramos*, 463 U.S. 992 (1983) (jury responsibility not undermined by instruction that governor has power to reduce sentence of life imprisonment without parole). *See also Lowenfield* v. *Phelps*, 484 U.S. —, 98 L.Ed.2d 568 (1988) (poll of jury and supplemental jury instruction on obligation to consult and attempt to reach a verdict was not unduly coercive on death sentence issue, even though consequence of failing to reach a verdict was automatic imposition of life sentence without parole).

[P. 1402, add to N.15:]

Accord, *Skipper* v. *South Carolina*, 476 U.S. 1 (1986) (exclusion of mitigating "good character" evidence); *Hitchcock* v. *Dugger*, 481 U.S. —, 95 L.Ed.2d 347 (1987) (instruction limited jury to consideration of mitigating factors specifically enumerated in statute). A jury instruction that can be interpreted as requiring jury unanimity on the existence of each mitigating factor before that factor may be weighed against aggravating factors is invalid as in effect allowing one juror to veto consideration of any and all mitigating factors. *Mills* v. *Maryland*, 486 U.S. —, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). Not invalid under *Lockett*, however, is an instruction that the jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling," since in essence the instruction merely cautions the jury not to base its decision "on factors not presented at the trial." *California* v. *Brown*, 479 U.S. 538, 543 (1987). *And cf. Franklin* v. *Lynaugh*, 487 U.S. —, 104 S. Ct. 25, 101 L.Ed.2d 155 (1988) (consideration of defendant's character may be limited to context of assessment of future dangerousness).

[P. 1402, add to text following N.15:]

The appropriate focus is on the character and culpability of the defendant, and not on the character of the victim or the amount of emotional distress caused to the victim's family or community; therefore, the Court ruled in *Booth* v. *Maryland*, consideration of a "victim impact statement" "creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner." [5]

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[5] 482 U.S. —, 96 L.Ed.2d 440, 450 (1987). And culpability, the Court added, "depends not on fortuitous circumstances such as the composition [or articulateness] of

[P. 1402, add to N.16:]

Illustrative of the general observation in the text is *Zant* v. *Stephens*, 462 U.S. 862, 878–79 (1983): statutory aggravating circumstances serve a narrowing purpose by "circumscrib[ing] the class of persons eligible for the death penalty," but as long as the defendant falls within the statutory class, the jury's consideration need not be so limited, but may include "an individualized determination on the basis of the character of the individual and the circumstances of the crime." This narrowing function may be served at the sentencing phase or at the guilt phase; the fact that an aggravating circumstance justifying capital punishment duplicates an element of the offense of first-degree murder does not render the procedure invalid. *Lowenfield* v. *Phelps*, 484 U.S. —, 98 L.Ed.2d 568 (1988).

[P. 1403, add to N.22:]

Accord, *Cabana* v. *Bullock*, 474 U.S. 376 (1986) (also holding that proper remedy in habeas case is to remand for state court determination as to whether Enmund findings have been made).

[P. 1403, add to text following N. 23:]

In *Tison* v. *Arizona* the Court eased the "intent to kill" requirement, holding that, in keeping with an "apparent consensus" among the states, "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." [6]

The Court has held that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding satisfying the minimum requirements of due process.[7] The Court noted that execution of the insane had been considered cruel and unusual at common law and at the time of adoption of the Bill of Rights, and continues to be so viewed today. And, while no states purport to permit the execution of the insane, a number, including Florida, leave the determination

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[the] victim's family, but on circumstances over which [the defendant] has control." 96 L.Ed.2d at 449 n.7. The decision was 5–4, with Justice Powell's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, and Stevens, and with Chief Justice Rehnquist and Justices White, O'Connor, and Scalia dissenting.

[6] 481 U.S. —, 95 L.Ed.2d 127, 145 (1987). The decision was 5–4. Justice O'Connor's opinion for the Court viewed a "narrow" focus on intent to kill as "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers," 95 L.Ed.2d at 144, and concluded that "reckless disregard for human life" may be held to be "implicit in knowingly engaging in criminal activities known to carry a grave risk of death." *Id.*

[7] *Ford* v. *Wainwright*, 477 U.S. 399 (1986). There was an opinion of the Court only on the first issue, that the Eighth Amendment creates a right not to be executed while insane. Justice Marshall's opinion to that effect was joined by Justices Brennan, Blackmun, Stevens, and Powell. The Court's opinion did not attempt to define insanity; Justice Powell's concurring opinion would have held the prohibition applicable only for "those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* at 422.

to the governor. Florida's procedures, the Court held, fell short of due process because the decision was vested in the governor, and because the defendant was given no opportunity to be heard, the governor's decision being based on reports of three state-appointed psychiatrists.[8]

A less clear-cut decision emerged from the Court's first consideration of whether capital punishment may be imposed on juveniles. In *Thompson* v. *Oklahoma*, the Court invalidated a statutory scheme which permitted capital punishment to be imposed for crimes committed before age 16; no minimum age for capital punishment was specified, but a separate provision allowed juveniles to be treated as adults for some purposes.[9]

[P. 1404, add to text at end of section:]

A strong statistical showing of racial disparity in capital sentencing cases is insufficient to establish an Eighth Amendment violation, the Court ruled in *McCleskey* v. *Kemp*.[10] Statistics alone do not establish racial discrimination in any particular case, the Court concluded, but "at most show only a likelihood that a particular factor entered into some decisions." [11] Just as important to the outcome, however, was the Court's application of the two overarching principles of prior capital punishment cases: that a state's system must narrow a sentencer's discretion to impose the death penalty (e.g., by carefully defining "aggravating" circumstances), but must

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[8] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity . . . calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411–12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." *Id.*, at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[9] 487 U.S. —, 108 S. Ct. 2687, 101 L.Ed.2d 702 (1988). A plurality opinion by Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, argued that the Eighth Amendment prohibits execution of anyone under the age of 16 at the time of his offense. Concurring Justice O'Connor found the Oklahoma scheme defective as not necessarily a product of the special care and deliberation that must attend decisions to impose the death penalty, and favored postponement of the more general issue. Justice Scalia, joined by Chief Justice Rehnquist and by Justice White, dissented; Justice Kennedy did not participate.

[10] 481 U.S. —, 95 L.Ed.2d 262 (1987). The decision was 5–4. Justice Powell's opinion of the Court was joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia. Justices Brennan, Blackmun, Stevens, and Marshall dissented.

[11] 95 L.Ed.2d at 289.

not constrain a sentencer's discretion to consider mitigating factors relating to the character of the defendant. While the dissenters saw the need to narrow discretion in order to reduce the chance that racial discrimination underlies jury decisions to impose the death penalty,[12] the majority emphasized the need to preserve jury discretion not to impose capital punishment. Reliance on statistics to establish a prima facie case of discrimination, the Court feared, could undermine the requirement that capital sentencing jurors "focus their collective judgment on the unique characteristics of a particular criminal defendant"—a focus that can result in "final and unreviewable" leniency.[13]

— Proportionality

[P. 1405, add to N. 10:]

In *Solem* v. *Helm*, 463 U.S. 277, 297 n.22 (1983), an Eighth Amendment proportionality case, the Court suggested in dictum that life imprisonment without possibility of parole of a recidivist who was an alcoholic, and all of whose crimes had been influenced by his alcohol use, was "unlikely to advance the goals of our criminal justice system in any substantial way."

[P. 1407, add to end of section:]

Rummel was distinguished in *Solem* v. *Helm*,[14] the Court stating unequivocally that the cruel and unusual punishments clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences." [15] Helm, like Rummel, had been sentenced under a recidivist statute following conviction for a nonviolent felony involving a small amount of money.[16] The difference was that Helm's sentence of life imprisonment without possibility of parole was viewed as "far more severe than the life sentence we described in *Rummel*." [17] Rummel, the

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[12] *Id.* at 309 (Brennan), 313 (Blackmun), 326 (Stevens).

[13] *Id.* at 291. Concern for protecting "the fundamental role of discretion in our criminal justice system" also underlay the Court's rejection of an equal protection challenge in *McCleskey*. *See* p. 154, *infra*.

[14] 463 U.S. 277 (1983). The case, as *Rummel*, was decided by 5–4 vote, with the *Rummel* dissenters, joined by Justice Blackmun from the *Rummel* majority, composing the majority, and with Justice O'Connor taking Justice Stewart's place in opposition to holding the sentence invalid. Justice Powell wrote the opinion of the Court in *Helm*, and Chief Justice Burger wrote the dissent.

[15] 463 U.S. at 284, 288.

[16] The final conviction was for uttering a no-account check in the amount of $100; previous felony convictions were also for nonviolent crimes described by the Court as "relatively minor." 463 U.S. at 296–97.

[17] 463 U.S. at 297.

Court pointed out, had been eligible for parole after 12 years' imprisonment, while Helm had only the possibility of executive clemency, characterized by the Court as "nothing more than a hope for 'an *ad hoc* exercise of clemency.'" [18] In *Helm* the Court also spelled out the "objective criteria" by which proportionality issues should be judged: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." [19] Measured by these criteria Helm's sentence was cruel and unusual. His crime was relatively minor, yet life imprisonment without possibility for parole was the harshest penalty possible in South Dakota, reserved for such other offenses as murder, manslaughter, kidnapping, and arson. In only one other state could he have received so harsh a sentence, and in no other state was it mandated.[20]

— Prisons and Punishment

[P. 1408, add to N.18:]

But cf. Whitley v. *Albers*, 475 U.S. 312 (1986) (arguably excessive force in suppressing prison uprising not cruel and unusual punishment).

[18] 463 U.S. at 303.

[19] 463 U.S. at 292.

[20] For a suggestion that Eighth Amendment proportionality analysis may limit the severity of punishment possible for prohibited private and consensual homosexual conduct, see Justice Powell's concurring opinion in *Bowers* v. *Hardwick*, 478 U.S. 186, 197 (1986).

TENTH AMENDMENT

Effect of Provision on Federal Powers

— Federal Regulations Affecting State Activities and Instrumentalities

[P. 1423, add to N.17:]

EEOC v. *Wyoming*, 460 U.S. 226 (1983). The Court distinguished *National League of Cities*, holding that application of the Age Discrimination in Employment Act to state fish and game wardens did not directly impair the state's ability to structure integral operations in areas of traditional governmental function, since the state remained free to assess each warden's fitness on an individualized basis and retire those found unfit for the job.

[P. 1423, add new paragraph at end of section:]

The Court overruled *National League of Cities* in *Garcia* v. *San Antonio Metropolitan Transit Auth.*[1] Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren," and that the Court in 1976 had "tried to repair what did not need repair."[2] With only passing reference to the Tenth Amendment the Court nonetheless clearly reverted to the Madisonian view of the Amendment reflected in *Unites States* v. *Darby*.[3] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[4] The principal restraints on congressional exercise of the Commerce power are to be found not in the Tenth Amendment or in the Commerce Clause itself, but in the structure of the Federal Government and in the political processes.[5] "Freestanding conceptions of state sovereignty" such as the *National League of Cities* test subvert the federal system by "invit[ing] an unelected federal judiciary to make decisions about which state policies it favors and

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[1] 469 U.S. 528 (1985). The issue was again decided by a 5 to 4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection.

[2] *Id.*, at 557.

[3] 312 U.S. 100, 124 (1941), main text p. 1417; Madison's views were quoted by the Court in *Garcia*, 469 U.S. at 549.

[4] 469 U.S. at 549.

[5] "Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited the role of states in selecting the President, and the equal representation of states in the Senate. *Id.*, at 551.

which ones it dislikes." [6] While continuing to recognize that "Congress' authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits." [7]

In sum, the Court in *Garcia* seems to have said that most but not necessarily all disputes over the effects on state sovereignty of federal commerce power legislation are to be considered political questions. What it will take for legislation to so threaten the "special and specific position" that states occupy in the constitutional system as to require judicial rather than political resolution must await subsequent cases.

The first indication is that it will take a very unusual case indeed. In *South Carolina* v. *Baker* the Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraordinary defects in the national political process" before the Court will apply substantive judicial review standards to claims that Congress has regulated state activities in violation of the Tenth Amendment.[8] A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." [9] Thus, the general rule is that "limits on Congress' authority to regulate state activities . . . are structural, not substantive—i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." [10]

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[6] 469 U.S. at 550, 546.

[7] 469 U.S. at 556.

[8] 485 U.S. —, 99 L.Ed.2d 592, 603 (1988). Justice Scalia, in a separate concurring opinion, objected to this language as departing from the Court's assertion in *Garcia* that the "constitutional structure" imposes some affirmative limits on congressional action. 99 L.Ed.2d at 613.

[9] 99 L.Ed.2d at 603.

[10] Id. at 602. The Court did not foreclose the possibility that a different standard might apply to a claim that a federal statute commandeers state regulatory machinery to advance federal goals, distinguishing language in *FERC* v. *Mississippi* (456 U.S. 742, 759 (1982)) as being inapplicable to the issue of whether the Tenth Amendment "shields the states from generally applicable federal regulations." *See* 99 L.Ed.2d at 603-04.

ELEVENTH AMENDMENT

The Nature of the States' Immunity

[P. 1434, add to text following N.11:]

The Court has recently declared that "the principle of sovereign immunity [reflected in the Eleventh Amendment] is a constitutional limitation on the federal judicial power established in Art. III," but almost in the same breath has acknowledged that "[a] sovereign's immunity may be waived." [1]

[P. 1435, add to N.23:]

Four Justices now argue that *Hans* should be overruled, Justices Marshall, Blackmun, and Stevens having joined Justice Brennan's dissent in *Welch* v. *Texas Dep't of Highways and Transp.*, 483 U.S. —, 97 L.Ed.2d 389 (1987).

Suits Against States

— Consent to Suit and Waiver

[P. 1437, add to text following N.5:]

A state's waiver of sovereign immunity must now be "unequivocally expressed," [2] the Court requiring not only a general waiver, but also an expression of "intention [by the State] to subject itself to suit in *federal court.*" [3] Thus, states which have totally abolished sovereign immunity for purposes of state law actions might still be extended immunity in federal court absent express waiver for purposes of federal court actions.[4]

[P. 1437, add to text following N.8:]

This aspect of *Parden* has now been overruled, a plurality of the Court emphasizing that congressional abrogation of immunity must be express and unmistakable.[5]

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[1] *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 98, 99 (1984).

[2] *Id.* at 99.

[3] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 241 (1985) (emphasis original).

[4] *See* Justice Brennan's dissenting opinion in *Scanlon*, 473 U.S. at 253 n.5. The sweep of the Court's ruling is not completely clear, since the Court characterized the provision at issue as "simply authoriz[ing] the legislature to waive the State's sovereign immunity." 473 U.S. at 241. Thus the Court did not have before it "an unequivocal waiver" lacking only in specific reference to federal court actions.

[5] *Welch* v. *Texas Dep't of Highways and Transp.*, 483 U.S. —, 97 L.Ed.2d 389 (1987). Justice Powell's plurality opinion was joined by Chief Justice Rehnquist and by Justices White and O'Connor. Justice Scalia, concurring, thought *Parden* should be overruled because it must be assumed that Congress enacted the FELA and other statutes with the understanding that *Hans* v. *Louisiana* shielded states from immunity.

Congressional Withdrawal of Immunity

[P. 1439, add to text following N.18:]

The rule now is that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute" itself.[6] General language subjecting to suit in federal court "any recipient of Federal assistance" under the Rehabilitation Act was deemed insufficient to satisfy this test, not because of any question about whether states are "recipients" within the meaning of the provision, but because "given their constitutional role, the States are not like any other class of recipients of federal aid." [7]

Suits Against State Officials

[P. 1447, add to N.11:]

But cf. Green v. *Mansour*, 474 U.S. 64 (1985). "Notice relief" permitted under *Quern* v. *Jordan* is consistent with the Eleventh Amendment only insofar as it is ancillary to valid prospective relief designed to prevent ongoing violations of federal law. Thus, where Congress has changed the AFDC law and the State is complying with the new law, an order to state officials to notify claimants that past payments may have been inadequate conflicts with the Eleventh Amendment.

[P. 1447, add to text following N.14:]

The Court also applied *Edelman* in *Papasan* v. *Allain*,[8] holding that a claim against a state for payments representing a continuing obligation to meet trust responsibilities stemming from a 19th century grant of public lands for benefit of education of the Chickasaw Indian Nation is barred by the Eleventh Amendment · indistinguishable from an action for past loss of trust corpus, but that an Equal Protection claim for present unequal distribution of school land funds is the type of ongoing violation for which the Eleventh Amendment does not bar redress.

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[6] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985). *Accord, Welch* v. *Texas Dep't of Highways and Transp.*, 483 U.S. —, 97 L.Ed.2d 389 (1987) (Jones Act, extending cause of action to "any seaman who shall suffer personal injury," does not express unmistakable congressional intent to subject states to suit in federal court).

[7] 473 U.S. at 246 (interpreting § 505 of the Rehabilitation Act, 29 U.S.C. § 794a).

[8] 478 U.S. 265 (1986).

THIRTEENTH AMENDMENT

Peonage

[P. 1459, add to text at end of section:]

The Court looked to the meaning of the Thirteenth Amendment in interpreting two enforcement statutes, one prohibiting conspiracy to interfere with exercise or enjoyment of constitutional rights,[1] the other prohibiting the holding of a person in a condition of involuntary servitude.[2] For purposes of prosecution under these authorities, the Court held, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." [3]

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[1] 18 U.S.C. § 241.

[2] 18 U.S.C. § 1584.

[3] *United States* v. *Kozminski*, 487 U.S. —, 108 S. Ct. 2751, 101 L.Ed.2d 788 (1988). Compulsion of servitude through "psychological coercion," the Court ruled, is not prohibited by these statutes.

FOURTEENTH AMENDMENT

DUE PROCESS OF LAW

Substantive Due Process and Noneconomic Liberty

[P. 1574, add to N.8:]

But cf. Bowers v. *Hardwick*, 478 U.S. 186 (1986) (no protected right to engage in homosexual sodomy in privacy of home).

[P. 1576, add new paragraph at end of section:]

Substantive due process analysis was utilized by the Court in *Regents of the University of Michigan* v. *Ewing*,[1] in which the Court "assume[d] the existence of a constitutionally protectible property interest in . . . continued enrollment" in a state university, but held that the student had not been arbitrarily dismissed. A high degree of deference should be accorded to academic decisions, the Court concluded. The limited constitutional right is violated only by a showing that dismissal resulted from "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." [2]

— Abortion

[P. 1579, add to N.8:]

In two 1983 cases the Court applied the *Bellotti* v. *Baird* standard for determining whether judicial substitutes for parental consent requirements permit a pregnant minor to demonstrate that she is sufficiently mature to make her own decision on abortion. *Compare City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (no opportunity for case-by-case determinations); *with Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983) (adequate individualized consideration).

[P. 1580, add new paragraph to text following N.10:]

The Court, reaffirming *Roe* v. *Wade*,[3] has continued to apply its principles to a variety of state statutes attempting to regulate

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[1] 474 U.S. 214 (1985). The Court's decision was unanimous, although concurring Justice Powell thought the reliance on substantive due process unnecessary because procedural due process could protect a statutory right to continued enrollment.

[2] 474 U.S. at 225.

[3] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 419–20 (1983). In refusing to overrule *Roe* v. *Wade*, the Court merely cited the principle of *stare decisis*. Justice Powell's opinion of the Court was joined by Chief Justice Burger, and by Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor, joined by Justices White and Rehnquist, dissented, voicing disagreement with the trimester approach and suggesting instead that throughout pregnancy the test

the circumstances of abortions. These have included requirements for hospital-only abortions, licensing of clinics, parental consent,[4] informed consent, waiting periods prior to abortions, pathology reports, and presence of a second physician. A requirement that all abortions performed after the first trimester be performed in a hospital is unconstitutional as imposing "a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and [at least during the first few weeks of the second trimester] safe abortion procedure." [5] While the state's interest in regulating health during the second trimester is legitimate, the state must nonetheless make a "reasonable" effort to confine its regulation to effectuating its legitimate purpose and may not indiscriminately rely on the trimester categorization.[6] A state may, however, require that abortions be performed in hospitals *or* licensed outpatient clinics, as long as licensing standards do not "depart from accepted medical practice." [7] Various "informed consent" requirements were struck down as intruding upon the discretion of the physician, and as being aimed at discouraging abortions rather than at informing the pregnant woman's decision; [8] while the state has a legitimate interest in ensuring that the woman's consent is informed, it may not demand of the physician "a recitation of an inflexible list of information" unrelated to the particular patient's health, and, for that matter, may not demand that the physician rather than some other qualified person render the coun-

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should be the same: whether state regulation constitutes "unduly burdensome interference with [a woman's] freedom to decide whether to terminate her pregnancy." 462 U.S. at 452, 461. In the 1986 case of *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), Justice White, joined by Justice Rehnquist, advocated overruling of *Roe* v. *Wade*, Chief Justice Burger thought *Roe* v. *Wade* had been extended to the point where it should be reexamined, and Justice O'Connor repeated misgivings expressed in her *Akron* dissent.

[4] *See* addition to P. 1579 n.8 *supra*.

[5] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 438 (1983); *Accord, Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983). The Court in *Akron* relied on evidence that "dilation and evacuation" (D&E) abortions performed in clinics cost less than half as much as hospital abortions, and that common use of the D&E procedure had "increased dramatically" the safety of second trimester abortions in the 10 years since *Roe* v. *Wade*. 462 U.S. at 435–36.

[6] Justice O'Connor suggested in dissent that the *Roe* trimester framework "is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception." 462 U.S. at 458.

[7] *Simopoulos* v. *Virginia*, 462 U.S. 506, 516 (1983).

[8] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 444–45 (1983); *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

seling.[9] Similarly, a state may not require a 24-hour waiting period following a woman's written, informed consent.[10] On the other hand, the Court upheld a requirement that tissue removed in clinic abortions be submitted to a pathologist for examination, since the same requirements were imposed for in-hospital abortions and for almost all other in-hospital surgery.[11] Also, the Court upheld a requirement that a second physician be present at abortions performed after viability in order to assist in saving the life of the fetus.[12]

— Privacy: Its Constitutional Dimension

[P. 1586, add to text following N.10:]

Stanley was further distinguished in *Bowers* v. *Hardwick* as being "firmly grounded in the First Amendment."[13] Thus, the Court held in *Bowers*, there is no protected right to engage in homosexual sodomy in the privacy of the home, *Stanley* not implicitly creating protection for "voluntary sexual conduct [in the home] between consenting adults."[14]

[P. 1588, add to text following N.15:]

In *Bowers* v. *Hardwick*,[15] the Court by 5-4 vote roundly rejected the suggestion that the privacy cases protecting "family, mar-

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[9] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 448-49 (1983).

[10] *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416, 450-51 (1983). *See also Hartigan* v. *Zbaraz*, 484 U.S. —, 98 L.Ed.2d 478 (1987) (affirming by equally divided vote appeals court ruling holding unconstitutional a 24-hour waiting requirement applicable only to minors).

[11] *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476, 486-90 (1983).

[12] *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983). The decision on this issue was decided by vote of 5-4 without an opinion of the Court. Justice Powell, joined by Chief Justice Burger, viewed the measure as reasonably furthering the state's interest in protecting the lives of viable fetuses; concurring Justice O'Connor, joined by Justices White and Rehnquist, expressed the view that this state interest is extant throughout pregnancy. *Id.*, at 505. Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, viewed the measure as superfluous and therefore burdensome in those cases in which an abortion method chosen to protect the mother would preclude survival of the fetus.

[13] 478 U.S. 186, 195 (1986).

[14] 478 U.S. at 195-96. Dissenting Justice Blackmun challenged the Court's characterization of *Stanley*, suggesting that it had rested as much on the Fourth as on the First Amendment, and that "the right of an individual to conduct intimate relationships in . . . his or her own home [is] at the heart of the Constitution's protection of privacy." *Id.*, at 207-08.

[15] 478 U.S. 186 (1986). The Court's opinion was written by Justice White, and joined by Chief Justice Burger and by Justices Powell, Rehnquist, and O'Connor. The Chief Justice and Justice Powell added brief concurring opinions. Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens, and Justice Stevens, joined by Justices Brennan and Marshall, added a separate dissenting opinion.

riage, or procreation" extend any protection for private consensual homosexual sodomy,[16] and also rejected the more comprehensive claim that the cases "stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription." [17] Moreover, the Court refused to create any such fundamental right. Justice White's opinion for the Court in *Hardwick* sounded the same opposition to "announcing rights not readily identifiable in the Constitution's text" that underlay his dissents in the abortion cases.[18] In addition, the Court concluded that rationales relied upon in the earlier privacy cases do not support "a fundamental right to homosexuals to engage in acts of consensual sodomy." [19] Heavy reliance was placed on the fact that prohibitions on sodomy have "ancient roots," and on the fact that half of the states still prohibit the practices.[20] The privacy of the home does not immunize all behavior from state regulation, and the Court was "unwilling to start down [the] road" of immunizing "voluntary sexual conduct between consenting adults." [21] Justice Blackmun's dissent was critical of the Court's phrasing of the issue as one of homosexual sodomy,[22] and asserted that the basic issue was the individual's privacy right "to be let alone." The privacy cases are not limited to protection of the family and the right to procreation, he asserted, but instead stand for the broader

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[16] "[N]one of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy." 478 U.S. at 190–91.

[17] *Id.* at 191. The Court asserted that *Carey* v. *Population Services Int'l*, 431 U.S. 678, 694 n.17 (1977), which had reserved decision on the issue, had established that the privacy right "did not reach so far."

[18] 478 U.S. at 191.

[19] In the Court's view, homosexual sodomy is neither a fundamental liberty "implicit in the concept of ordered liberty" nor is it "deeply rooted in this Nation's history and tradition." *Id.*, at 191–92.

[20] *Id.* Chief Justice Burger's brief concurring opinion amplified on this theme, concluding that constitutional protection for "the act of homosexual sodomy . . . would . . . cast aside millennia of moral teaching." *Id.*, at 197. Justice Powell cautioned that Eighth Amendment proportionality principles might limit the severity with which states can punish the practices (Hardwick had been charged but not prosecuted, and had initiated the action to have the statute under which he had been charged declared unconstitutional). *Id.*

[21] The Court voiced concern that "it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." *Id.*, at 195–96. Dissenting Justices Blackmun (*id.*, at 209 n.4) and Stevens (*id.*, at 217–18) suggested that these crimes are readily distinguishable.

[22] *Id.*, at 199. The Georgia statute at issue, like most sodomy statutes, prohibits the practices regardless of the sex or marital status of the participants. *See Id.*, at 188 n.1. Justice Stevens too focused on this aspect, suggesting that the earlier privacy cases clearly bar a state from prohibiting sodomous acts by married couples, and that Georgia had not justified selective application to homosexuals. *Id.*, at 219.

principle of individual autonomy and choice in matters of sexual intimacy.[23]

— Family Relationships

[P. 1589, add to N.20:]

Continuing the limitation of the right of privacy to family-related activities is *Bowers* v. *Hardwick*, 478 U.S. 186 (1986).

— Liberty Interests of Retarded and Handicapped: Commitment and Treatment

[P. 1591, add to N.11:]

See also Allen v. *Illinois*, 478 U.S. 364, 373 (1986) (dictum that person civilly committed as "sexually dangerous person" might be entitled to protection under the self-incrimination clause if he could show that his confinement "is essentially identical to that imposed upon felons with no need for psychiatric care").

PROCEDURAL DUE PROCESS: CIVIL

Power of the States to Regulate Procedure

— Costs, Damages, and Penalties

[P. 1598, add to text following N.17:]

Congress may severely restrict attorney's fees in an effort to keep an administrative claims proceeding informal.[24]

— Evidence and Presumptions

[P. 1601, add to N.12:]

Application of the traditional preponderance of the evidence standard is permissible, however, in paternity actions. *Rivera* v. *Minnich*, 483 U.S. —, 97 L.Ed.2d 473 (1987).

— Appeals

[P. 1604, add to N.12:]

Cf. Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. —, 100 L.Ed.2d 62 (1988) (assessment of 15% penalty on party who unsuccessfully appeals from money judgment meets rational basis test under equal protection challenge, since it applies to plaintiffs and defendants alike and does not single out one class of appellants).

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[23] *Id.*, at 204-06.

[24] *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (limitation of attorneys' fees to $10 in veterans benefit proceedings does not violate claimants' due process rights absent a showing of probability of error in the proceedings that presence of attorneys would sharply diminish).

Jurisdiction

— Suability of Foreign Corporations

[P. 1610, add to first group of citations in N.13:]

Helicopteros Nacionales de Colombia v. *Hall*, 466 U.S. 408 (1984).

[P. 1615, add to N.8:]

The balancing of interests test was applied in *Asahi Metal Industry Co.* v. *Superior Court*, 480 U.S. 102 (1987), holding unreasonable exercise of jurisdiction by a California court over an indemnity action by a Taiwan tire manufacturer against a Japanese manufacturer of tire valves, the underlying damage action by a California motorist having been settled.

[P. 1615, add new paragraph to end of section:]

The Court has applied *International Shoe* principles in several more situations. Circulation of a magazine in the forum state is an adequate basis for jurisdiction over the corporate magazine publisher in a libel action; the fact that the plaintiff has no contact with the forum state is not dispositive since the inquiry focuses on the relations among the defendant, the forum, and the litigation.[25] On the other hand, damage done to the plaintiff's reputation in his home state caused by circulation of a defamatory magazine article there may justify assertion of jurisdiction that would otherwise be absent.[26] While there is no *per se* rule that a contract with an out-of-state party automatically establishes jurisdiction to enforce the contract in the other party's forum, a franchisee who has entered into a franchise contract with an out-of-state corporation may be subject to suit in the corporation's home state where the overall circumstances (contract terms themselves, course of dealings) demonstrate a deliberate reaching out to establish contacts with the franchisor in the franchisor's home state.[27]

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[25] *Keeton* v. *Hustler Magazine*, 465 U.S. 770 (1984) (holding as well that the forum state may apply "single publication rule" making defendant liable for nationwide damages).

[26] *Calder* v. *Jones*, 465 U.S. 783 (1984) (jurisdiction over reporter and editor responsible for defamatory article which they knew would be circulated in subject's home state).

[27] *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). *But cf. Helicopteros Nacionales de Colombia* v. *Hall*, 466 U.S. 408 (1984) (purchases and training within state, both unrelated to cause of action, are insufficient to justify general *in personam* jurisdiction).

— Notice: Service of Process

[P. 1621, add as note at end of second sentence in section:]

"There . . . must be a basis for the defendant's amenability to service of summons. Absent consent, this means there must be authorization for service of summons on the defendant." *Omni Capital Int'l* v. *Wolff*, 484 U.S. —, 98 L.Ed.2d 415 (1987).

[P. 1622, add to N.20:]

See also Mennonite Bd. of Missions v. *Adams*, 462 U.S. 791 (1983) (personal service or notice by mail is required for mortgagee of real property subject to tax sale); *Tulsa Professional Collection Servs.* v. *Pope*, 485 U.S. —, 99 L.Ed.2d 565 (1988) (notice by mail or other appropriate means to reasonably ascertainable creditors of probated estate).

[P. 1622, add to text following N.22:]

In a class action, due process is satisfied by notification by mail of out-of-state class members, with opportunity to "opt out" but with no requirement that inclusion in the class be contingent upon affirmative response.[28]

The Procedure Which Is Due Process

— When Is Process Due

[P. 1636, add to N. 14 following *Arnett* cite:]

Cleveland Bd. of Educ. v. *Loudermill*, 470 U.S. 532 (1985) (discharge of state government employee).

[P. 1636, add to end of N.14:]

FDIC v. *Mallen*, 486 U.S. —, 100 L.Ed.2d 265 (1988) (strong public interest in the integrity of the banking industry justifies suspension of indicted bank official with no pre-suspension hearing, and with 90-day delay before decision resulting from post-suspension hearing).

[P. 1636, add new paragraph following N.16:]

In *Brock* v. *Roadway Express, Inc.*, a Court plurality applied similar analysis to governmental regulation of private employment, determining that a full evidentiary hearing is not required to safeguard the interests of an employer prior to the ordered reinstatement of an employee dismissed for cause, but that the employer is entitled to be informed of the substance of the employee's charges, and to have an opportunity for informal rebuttal.[29] The principal

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[28] *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985).

[29] 481 U.S. —, 107 S. Ct. 1740, 95 L.Ed.2d 239 (1987). Justice Marshall's plurality opinion was joined by Justices Blackmun, Powell, and O'Connor; Chief Justice Rehnquist and Justice Scalia joined Justice White's opinion taking a somewhat narrower

difference with the *Mathews* v. *Eldridge* test was that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer "in controlling the makeup of its workforce" and that of the employee in not being discharged for whistleblowing. Whether the case signals a shift away from evidentiary hearing requirements in the context of regulatory adjudication will depend on future developments.[30]

[P. 1638, add to text at end of sentence containing N.22:]

Parratt v. *Taylor* has been partially overruled, the Court now holding that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." [31] Hence, there is no requirement for procedural due process stemming from such negligent acts and no resulting basis for suit under 42 U.S.C. § 1983 for deprivation of rights deriving from the Constitution.

PROCEDURAL DUE PROCESS: CRIMINAL

Clarity in Criminal Statutes: The Void-for-Vagueness Doctrine

[P. 1647, add to N.11:]

And see Kolender v. *Lawson*, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide "credible and reliable" identification is facially void as encouraging arbitrary enforcement).

Entrapment

[P. 1649, add to N.21:]

Again, in *Mathews* v. *United States*, 485 U.S. —, 99 L.Ed.2d 54 (1988), holding that a defendant in a federal criminal case who denies commission of the crime is entitled to assert an "inconsistent" entrapment defense where the evidence warrants, the Court failed to clarify the basis for the defense.

Fair Trial

[P. 1652, add to N.13:]

Bias or prejudice of an appellate judge can also deprive a litigant of due process. *Aetna Life Ins. Co.* v. *LaVoie*, 475 U.S. 813 (1986) (failure of state supreme court judge with pecuniary interest—a pending suit on an indistinguishable claim—to recuse).

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view of due process requirements but supporting the plurality's general approach. Justices Brennan and Stevens would have required confrontation and cross-examination.

[30] For analysis of the case's implications, see Rakoff, "*Brock* v. *Roadway Express, Inc.*, and the New Law of Regulatory Due Process," 1987 Sup. Ct. Rev. 157.

[31] *Daniels* v. *Williams*, 474 U.S. 327, 328 (1986) (involving negligent acts by prison officials).

[P. 1654, add to N.20:]

But cf. Holbrook v. *Flynn*, 475 U.S. 560 (1986) (presence in courtroom of uniformed state troopers serving as security guards was not the same sort of inherently prejudicial situation).

[P. 1654, add to N.21:]

Crane v. *Kentucky*, 476 U.S. 683 (1986) (exclusion of testimony as to circumstances of a confession can deprive a defendant of a fair trial when the circumstances bear on the credibility as well as the voluntariness of the confession).

[P. 1654, add to text following N.21:]

Basic to due process is the right to testify in one's own defense; this right may not be restricted, the Court has held, by a state's *per se* rule excluding all hypnotically refreshed testimony.[32]

[P. 1654, add to N.22:]

For other cases applying *Sandstrom*, *see Francis* v. *Franklin*, 471 U.S. 307 (1985) (contradictory but ambiguous instruction not clearly explaining state's burden of persuasion on intent does not erase *Sandstrom* error in earlier part of charge); *Rose* v. *Clark*, 478 U.S. 570 (1986) (*Sandstrom* error can in some circumstances constitute harmless error under principles of *Chapman* v. *California*, 386 U.S. 18 (1967)). Similarly, improper arguments by a prosecutor do not necessarily constitute "plain error," and a reviewing court may consider in the context of the entire record of the trial the trial court's failure to redress such error in the absence of contemporaneous objection. *United States* v. *Young*, 470 U.S. 1 (1985).

Guilty Pleas

[P. 1655, add to N.2:]

Release-dismissal agreements, pursuant to which the prosecution agrees to dismiss criminal charges in exchange for the defendant's agreement to release his right to file a civil action for alleged police or prosecutorial misconduct, are not *per se* invalid. *Town of Newton* v. *Rumery*, 480 U.S. 386 (1987).

[P. 1656, add to N.6:]

Prior to the plea, however, the prosecutor may withdraw his first offer, and a defendant who later pled guilty after accepting a second less attractive offer has no right to enforcement of the first agreement. *Mabry* v. *Johnson*, 467 U.S. 504 (1984).

Prosecutorial Misconduct

[P. 1659, add to N.19:]

Similarly, there is no obligation that law enforcement officials preserve breath samples which have been utilized in a breath-analysis test; the *Agurs* materiality standard is met only by evidence which "possess[es] an exculpatory value . . . apparent before [it] was destroyed, and also [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California* v. *Trombetta*, 467 U.S. 479, 489 (1984).

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[32] *Rock* v. *Arkansas*, 483 U.S. —, 97 L.Ed.2d 37 (1987).

[P. 1659, add to N.21:]

Accord, Thigpen v. *Roberts*, 468 U.S. 27 (1984).

Proof, Burden of Proof, and Presumptions

[P. 1662 add to N.9:]

Patterson was followed in *Martin* v. *Ohio*, 480 U.S. 228 (1987) (state need not disprove defendant acted in self-defense based on honest belief she was in imminent danger, when offense is aggravated murder, an element of which is "prior calculation and design"). Justice Powell, again dissenting, urged a distinction between defenses that negate an element of the crime and those that do not. *Id.* at 236, 240.

[P. 1662, add to text following N.9:]

Also formalistic is the distinction between elements of the crime and sentencing factors; a state may treat as a sentencing consideration provable by a preponderance of the evidence the fact that defendant "visibly possessed a firearm" during commission of the offense.[33]

Sentencing

[P. 1666, add to N.1:]

An intervening conviction on other charges for acts committed prior to the first sentencing may justify imposition of an increased sentence following a second trial. *Wasman* v. *United States*, 468 U.S. 559 (1984).

[P. 1666, add to N.2:]

The *Pearce* presumption that an increased, judge-imposed second sentence represents vindictiveness also is inapplicable if the second trial came about because the trial judge herself concluded a retrial was necessary due to prosecutorial misconduct before the jury in the first trial. *Texas* v. *McCullough*, 475 U.S. 134 (1986).

The Problem of the Incompetent or Insane Defendant or Convict

[P. 1666, add to N.4:]

An indigent who makes a preliminary showing that his sanity at the time of his offense will be a substantial factor in his trial is entitled to a court-appointed psychiatrist to assist in presenting the defense. *Ake* v. *Oklahoma*, 470 U.S. 68 (1985).

[P. 1667, add to text following N.7:]

The Court held in *Ford* v. *Wainwright* that the Eighth Amendment prohibits the state from carrying out the death penalty on an individual who is insane, and that properly raised issues of pre-execution sanity must be determined in a proceeding satisfying the minimum requirements of due process.[34] Those minimum stand-

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[33] *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986) (the finding increased the minimum sentence that could be imposed but did not affect the maximum sentence).

[34] 477 U.S. 399 (1986).

ards are not met when the decision on sanity is left to the unfettered discretion of the governor; rather, due process requires the opportunity to be heard before an impartial officer or board.[35]

Commitment to a mental hospital of a criminal defendant acquitted by reason of insanity does not offend due process, and the period of confinement may extend beyond the period for which the person could have been sentenced if convicted.[36] The purpose of the confinement is not punishment, but treatment, and the Court explained that the length of a possible criminal sentence "therefore is irrelevant to the purposes of . . . commitment." [37] Thus, the insanity acquittee may be confined for treatment "until such time as he has regained his sanity or is no longer a danger to himself or society." [38]

Rights of Prisoners

[P. 1670, add new paragraph following N. 25:]

In *Turner* v. *Safley*,[39] the Court announced a general standard. "[W]hen a regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Several considerations, the Court indicated, are appropriate in determining reasonableness of a prison regulation. First, there must be a rational relation to a legitimate, content-neutral objective, such as prison security, broadly defined. Availability of other avenues for exercise of the inmate right suggests

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[35] There was no opinion of the Court on the issue of procedural requirements. Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, would hold that "the ascertainment of a prisoner's sanity calls for no less stringent standards than those demanded in any other aspect of a capital proceeding." 477 U.S. at 411-12. Concurring Justice Powell thought that due process might be met by a proceeding "far less formal than a trial," that the state "should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel." *Id.*, at 427. Concurring Justice O'Connor, joined by Justice White, emphasized Florida's denial of the opportunity to be heard, and did not express an opinion on whether the state could designate the governor as decisionmaker. Thus Justice Powell's opinion, requiring the opportunity to be heard before an impartial officer or board, sets forth the Court's holding.

[36] *Jones* v. *United States*, 463 U.S. 354 (1983). The fact that the affirmative defense of insanity need only be established by a preponderance of the evidence, while civil commitment requires the higher standard of clear and convincing evidence, does not render the former invalid; proof beyond a reasonable doubt of commission of a criminal act establishes dangerousness justifying confinement and eliminates the risk of confinement for mere idiosyncratic behavior.

[37] 463 U.S. at 368.

[38] 463 U.S. at 370.

[39] 482 U.S. —, 96 L.Ed.2d 64 (1987) (upholding a Missouri rule barring inmate-to-inmate correspondence, but striking down a prohibition on inmate marriages absent compelling reason such as pregnancy or birth of a child).

reasonableness. A further indicium of reasonableness is present if accommodation would have a negative effect on liberty or safety of guards or other inmates. On the other hand, an alternative to regulation "that fully accommodated the prisoner's rights at *de minimis* cost to valid penological interests" suggests unreasonableness.[40]

[P. 1671, add to end of paragraph continued from preceding page:]

Fourth Amendment protection is incompatible with "the concept of incarceration and the needs and objectives of penal institutions," hence a prisoner has no reasonable expectation of privacy in his prison cell protecting him from "shakedown" searches designed to root out weapons, drugs, and other contraband.[41] Avenues of redress "for calculated harassment unrelated to prison needs" are not totally blocked, the Court indicated; inmates may still seek protection in the Eighth Amendment or in state tort law.[42] Existence of "a meaningful postdeprivation remedy" for unauthorized, intentional deprivation of an inmate's property by prison personnel protects the inmate's due process rights.[43] Due process is not implicated at all by negligent deprivation of life, liberty, or property by prison officials.[44]

[P. 1671, add to text following third sentence of second full paragraph:]

However, reasons for denying an inmate's request to call witnesses need not be disclosed until the issue is raised in court.[45]

[P. 1672, add to text following N.11:]

Revocation of good time credits must be supported by "some evidence in the record," but an amount that "might be characterized as meager" is constitutionally sufficient.[46]

[P. 1672, add to text following N.12:]

The same principles govern interstate prison transfers.[47]

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[40] 96 L.Ed.2d at 80.

[41] *Hudson* v. *Palmer*, 468 U.S. 517, 526 (1984); *Block* v. *Rutherford*, 468 U.S. 576 (1984) (holding also that prison security needs support a rule prohibiting pretrial detainees contact visits with spouses, children, relatives, and friends).

[42] *Hudson* v. *Palmer*, 468 U.S. 517, 530 (1984).

[43] *Hudson* v. *Palmer*, 468 U.S. 517, 533 (1984) (holding that state tort law provided adequate postdeprivation remedies).

[44] *Daniels* v. *Williams*, 474 U.S. 327 (1986); *Davidson* v. *Cannon*, 474 U.S. 344 (1986).

[45] *Ponte* v. *Real*, 471 U.S. 491 (1985).

[46] *Superintendent* v. *Hill*, 472 U.S. 445, 454, 457 (1985).

[47] *Olim* v. *Wakinekona*, 461 U.S. 238 (1983).

Probation and Parole

[P. 1674, add to text following N.20:]

Ordinarily the written statement need not indicate that the sentencing court or review board considered alternatives to incarceration,[48] but a sentencing court must consider such alternatives if the probation violation consists of the failure of an indigent probationer, through no fault of his own, to pay a fine or restitution.[49]

[P. 1675, add to N.22:]

Following *Greenholtz*, the Court held in *Board of Pardons* v. *Allen*, 482 U.S. —, 96 L.Ed.2d 303 (1987), that a liberty interest was created by a Montana statute providing that a prisoner "shall" be released upon certain findings by a parole board.

The Problem of the Juvenile Offender

[P. 1678, add to text at end of section:]

The Court ruled in *Schall* v. *Martin*[50] that preventive detention of juveniles does not offend due process when it serves the legitimate state purpose of protecting society and the juvenile from potential consequences of pretrial crime, when the terms of confinement serve those legitimate purposes and are nonpunitive, and when procedures provide sufficient protection against erroneous and unnecessary detentions. A statute authorizing pretrial detention of accused juvenile delinquents on a finding of "serious risk" that the juvenile would commit crimes prior to trial, providing for expedited hearings (the maximum possible detention was 17 days), and guaranteeing a formal, adversarial probable cause hearing within that period, was found to satisfy these requirements.

EQUAL PROTECTION OF THE LAWS

Equal Protection: Judging Classifications by Law

— The Traditional Standard: Restrained Review

[P. 1700, add to list of cites in N.22:]

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432 (1985) (rejecting various justifications offered for exclusion of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses were permitted).

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[48] *Black* v. *Romano*, 471 U.S. 606 (1985).
[49] *Bearden* v. *Georgia*, 461 U.S. 660, 672 (1983).
[50] 467 U.S. 253 (1984).

— The New Standards: Active Review

[P. 1705, add to N.20:]

City of Cleburne v. *Cleburne Living Center*, 473 U.S. 432, 442 (1985) (holding that a lower court "erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation").

[P. 1705, add to text following N.20:]

While resisting creation of new suspect or "quasi-suspect" classifications, however, the Court may nonetheless apply the *Royster Guano* rather than the *Lindsley* standard of rationality.[51]

Testing Facially Neutral Classifications Which Impact on Minorities

[P. 1708, add to N.2:]

The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. *Wayte* v. *United States*, 470 U.S. 598 (1985) (no discriminatory purpose shown). *And see Bazemore* v. *Friday*, 478 U.S. 385 (1986) (existence of single-race, state-sponsored 4-H Clubs is permissible, given wholly voluntary nature of membership).

[P. 1709, add to N.8:]

Hunter v. *Underwood*, 471 U.S. 222 (1985) (circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor whites would also be disenfranchised thereby).

TRADITIONAL EQUAL PROTECTION: ECONOMIC REGULATION AND RELATED EXERCISES OF THE POLICE POWER

Taxation

— Classification for Purpose of Taxation

[P. 1714, add to N.5 under "Gasoline":]

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1983) (prohibition on pass-through to consumers of oil and gas severance tax).

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[51] *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985); *See* main text, pp. 1698–1702.

— Foreign Corporations

[P. 1716, change heading to "Foreign Corporations and Nonresidents":]

[P. 1717, add to N.25:]

This decision was described as "an anachronism" in *Western & Southern Life Ins. Co.* v. *State Bd. Of Equalization*, 451 U.S. 648, 667 (1981), the Court reaffirming the rule that taxes discriminating against foreign corporations must bear a rational relation to a legitimate state purpose.

[P. 1717, add to text at end of section:]

State taxation of insurance companies, insulated from Commerce Clause attack by the McCarran-Ferguson Act, must pass similar hurdles under the Equal Protection Clause. In *Metropolitan Life Ins. Co.* v. *Ward*,[52] the Court concluded that taxation favoring domestic over foreign corporations "constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." Rejecting the assertion that it was merely imposing "Commerce Clause rhetoric in equal protection clothing," the Court explained that the emphasis is different even though the result in some cases will be the same: the Commerce Clause measures the effects which otherwise valid state enactments have on interstate commerce, while the Equal Protection Clause merely requires a rational relation to a valid state purpose.[53] However, the Court's holding that the discriminatory purpose was invalid under equal protection analysis would also be a basis for invalidation under a different strand of Commerce Clause analysis.[54]

Also invalidated under equal protection analysis as not promoting a legitimate state purpose was a discrimination between residents and nonresidents in application of a use-tax credit for automobile sales taxes paid to another state.[55] Out-of-state residents who purchased and registered cars in another state before becoming residents were denied the credit, which was available for in-state residents who purchased cars out-of-state and registered

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[52] 470 U.S. 869, 878 (1985). The vote was 5–4, with Justice Powell's opinion for the Court being joined by Chief Justice Burger and by Justices White, Blackmun, and Stevens. Justice O'Connor's dissent was joined by Justices Brennan, Marshall, and Rehnquist.

[53] 470 U.S. at 880.

[54] The first level of the Court's "two-tiered" analysis of state statutes affecting commerce tests for virtual *per se* invalidity. "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

[55] *Williams* v. *Vermont*, 472 U.S. 14 (1985).

them in-state. The Court viewed as "wholly arbitrary" the discrimination "between motor vehicle registrants who purchased their cars out-of-state while they were Vermont residents and those who only came to Vermont after buying a car elsewhere." [56]

EQUAL PROTECTION AND RACE

Juries

[P. 1746, add to N.5:]

Vasquez v. *Hillery*, 474 U.S. 254 (1986) (habeas corpus remedy).

[P. 1746, add to N.6:]

The same class rule was revived to an uncertain degree in *Hobby* v. *United States*, 468 U.S. 339, 347 (1984), the Court suggesting that a white defendant challenging on due process grounds exclusion of blacks as grand jury foremen could not rely on equal protection principles protecting black defendants from "the injuries of stigmatization and prejudice" associated with the practice.

[P. 1748, add to text at end of section:]

The *Swain* holding as to the evidentiary standard was overruled in *Batson* v. *Kentucky*, the Court ruling that "a defendant may establish a prima facie case of purposeful [racial] discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's [own] trial." To rebut this showing, the prosecutor "must articulate a neutral explanation related to the particular case," but the explanation "need not rise to the level justifying exercise of a challenge for cause." [57]

Discrimination in the selection of grand jury foremen presents a closer question, answer to which depends in part on the responsibilities of a foreman in the particular system challenged. Thus the Court had "assumed without deciding" that discrimination in selection of foremen for state grand juries would violate equal protection in a system in which the judge selected a foreman to serve as a thirteenth voting juror, and that foreman exercised significant powers.[58] That situation was distinguished, however, in a due proc-

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[56] 472 U.S. at 23, 27. Dissenting Justice Blackmun questioned whether the statute, correctly interpreted, would extend the credit to in-state residents who purchased and registered a car out-of-state before registering in-state, and deemed the residency distinction valid as based on a reasonable assumption that most people will use their cars primarily in the state in which they reside.

[57] 476 U.S. 79, 96, 98 (1986). The ruling applies to cases pending on direct review or not yet final when *Batson* was decided, *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), but does not apply to a case on federal habeas corpus review, *Allen* v. *Hardy*, 478 U.S. 255 (1986).

[58] *Rose* v. *Mitchell*, 443 U.S. 545, 551 n.4 (1979).

ess challenge to the federal system, where the foreman's responsibilities are "essentially clerical" and where the selection is from among the members of an already-chosen jury.[59]

[P. 1748, add new section following N.16:]

Capital Punishment

In *McCleskey* v. *Kemp* [60] the Court rejected an equal protection claim of a black defendant who received a death sentence following conviction for murder of a white victim, even though a statistical study showed that blacks charged with murdering whites were more than 4 times as likely to receive a death sentence in the state than were defendants charged with killing blacks. The Court distinguished *Batson* v. *Kentucky* by characterizing capital sentencing as "fundamentally different" from jury venire selection; consequently, reliance on statistical proof of discrimination is less rather than more appropriate.[61] "Because discretion is essential to the criminal justice process, we would demand exceptionally clear proof before we would infer that the discretion has been abused." [62] Also, the Court noted, there is not the same opportunity to rebut a statistical inference of discrimination; jurors may not be required to testify as to their motives, and for the most part prosecutors are similarly immune from inquiry.[63]

Other Areas of Discrimination

— Marriage

[P. 1750, add to text following N.12:]

Similarly, a court may not deny custody of a child based on a parent's remarriage to a person of another race and the presumed

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[59] *Hobby* v. *United States*, 468 U.S. 339 (1984).

[60] 481 U.S. —, 95 L.Ed.2d 262 (1987). The decision was 5-4, with Justice Powell's opinion of the Court being joined by Chief Justice Rehnquist and by Justices White, O'Connor, and Scalia, and with Justices Brennan, Blackmun, Stevens, and Marshall dissenting.

[61] 95 L.Ed.2d at 279. Dissenting Justices Brennan, Blackmun and Stevens challenged this position as inconsistent with the Court's usual approach to capital punishment, in which greater scrutiny is required. *Id.* at 309, 314, 326.

[62] 95 L.Ed.2d at 281. Discretion is especially important to the role of a capital sentencing jury, which must be allowed to consider any mitigating factor relating to the defendant's background or character, or to the nature of the offense; the Court also cited the "traditionally 'wide discretion' " accorded decisions of prosecutors. *Id.*

[63] The Court distinguished *Batson* by suggesting that the death penalty challenge would require a prosecutor "to rebut a study that analyzes the past conduct of scores of prosecutors" whereas the peremptory challenge inquiry would focus only on the prosecutor's own acts. 95 L.Ed.2d at 281 n.17.

"best interests of the child" to be free from the prejudice and stigmatization that might result.[64]

— Elections

[P. 1751, add to N.21:]

Hunter v. *Underwood*, 471 U.S. 222 (1985) (disenfranchisement for crimes involving moral turpitude adopted for purpose of racial discrimination).

Permissible Remedial Utilizations of Racial Classifications

[P. 1751, add to N.1:]

Accord, *Johnson* v. *Transportation Agency*, 480 U.S. —, 94 L.Ed.2d 615 (1987). Nor does title VII prohibit a court from approving a consent decree providing broader relief than the court would be permitted to award. *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501 (1986). And, court-ordered relief pursuant to title VII may benefit persons not themselves the victims of discrimination. *Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 478 U.S. 421 (1986).

[P. 1751, add to N.2:]

United States v. *Paradise*, 480 U.S. 149 (1987) (promotion quota as court-ordered remedy for past discrimination in promotion of state troopers).

[P. 1755, add to text following N.18:]

There is no constitutional requirement that states in all circumstances pursue affirmative remedies to overcome past discrimination, the Court holding that adoption of "a wholly neutral admissions policy" for voluntary membership in state-sponsored 4-H Clubs was sufficient even though single race clubs continued to exist under that policy.[65]

[P. 1755, add to text at end of section:]

The Court has twice split 5–4 in ruling on constitutional challenges to affirmative action plans, striking down one and upholding another. In *Wygant* v. *Jackson Bd. of Education*,[66] the Court invalidated a provision of a collective bargaining agreement giving minority teachers a preferential protection from layoffs. In *United States* v. *Paradise*,[67] the Court upheld as a remedy for past dis-

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[64] *Palmore* v. *Sidoti*, 466 U.S. 429 (1984).

[65] *Bazemore* v. *Friday*, 478 U.S. 385 (1986). The voluntary nature of the clubs, unrestricted by state definition of attendance zones or other decisions affecting membership, presented a "wholly different milieu" from public schools.

[66] 476 U.S. 267 (1986).

[67] 480 U.S. 149 (1987).

crimination a court-ordered racial quota in promotions. However, due to the different factual backgrounds and to the absence of an opinion of the Court in either case, no clear dividing line emerges from a comparison of the two decisions. A plurality of Justices in *Wygant* thought that past societal discrimination alone is insufficient to justify racial classifications; they would require some convincing evidence of past discrimination by the governmental unit involved.[68] Concurring Justice White emphasized the harsh, direct effect of layoffs on affected non-minority employees.[69] A majority of Justices in *Paradise* emphasized that the egregious nature of the past discrimination by the governmental unit justified the ordered relief.[70] A plurality also viewed the remedy as affecting non-minorities less harshly than did the layoffs in *Wygant*, since the promotion quota would merely delay promotions of those affected.[71]

Guidance on constitutional issues is not necessarily afforded by cases arising under Title VII of the Civil Rights Act, the Court having asserted that "the *statutory* prohibition with which the employer must contend was not intended to extend as far as that of the Constitution," and that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace." [72]

THE NEW EQUAL PROTECTION

Classifications Meriting Close Scrutiny

— Alienage and Nationality

[P. 1758, add to N.12:]

The "political function" exception is inapplicable to notaries public, who do not perform functions going to the heart of representative government. *Bernal* v. *Fainter*, 467 U.S. 216 (1984).

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[68] 476 U.S. at 274–76 (opinion of Justice Powell, joined by Chief Justice Burger and by Justices Rehnquist and O'Connor).

[69] 476 U.S. at 294.

[70] 480 U.S. at 153 (opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Powell), *id.* at 189 (Justice Stevens).

[71] 480 U.S. at 182–82 (opinion of Justice Brennan, joined by Justices Marshall, Blackmun, and Powell).

[72] *Johnson* v. *Transportation Agency*, 480 U.S. —, 94 L.Ed.2d 615, 628 n.6, 630 (1987) (upholding a local governmental agency's voluntary affirmative action plan predicated upon underrepresentation of women rather than upon past discriminatory practices by that agency). The constitutionality of the agency's plan was not challenged. *See id.* at 623 n.2.

[P. 1761, add to N.3:]

But cf. Bernal v. *Fainter*, 467 U.S. 216 (1984) (citizenship requirement for notaries public violates equal protection).

— Sex

[P. 1763, add to N.16 list of title VII cases:]

Arizona Governing Comm. for Tax Deferred Annuity and Deferred Compensation Plans v. *Norris*, 463 U.S. 1073 (1983) (actuarially based lower monthly retirement benefits for women employees violates Title VII); *Meritor Savings Bank* v. *Vinson*, 477 U.S. 57 (1986) ("hostile environment" sex harassment claim is actionable).

[P. 1763, add to text following N.16:]

Some states have followed suit.[73]

[P. 1769, add to N.11:]

Congress responded by eliminating the dependency requirement but by adding a pension offset provision reducing spousal benefits by the amount of various other pensions received. Continuation in this context of the *Goldfarb* gender-based dependency classification for a five-year "grace period" was upheld in *Heckler* v. *Mathews*, 465 U.S. 728 (1984), as directly and substantially related to the important governmental interest in protecting against the effects of the pension offset the retirement plans of individuals who had based their plans on unreduced pre-*Goldfarb* payment levels.

— Illegitimacy

[P. 1776, add to N.12:]

Also not interfering with orderly administration of estates is application of *Trimble* in a probate proceeding ongoing at the time *Trimble* was decided; the fact that the death had occurred prior to *Trimble* was irrelevant. *Reed* v. *Campbell*, 476 U.S. 852 (1986).

[P. 1777, add to N.15:]

Similarly, a 2-year statute of limitations on paternity and support actions was held to deny equal protection to illegitimates in *Pickett* v. *Brown*, 462 U.S. 1 (1983), and a 6-year limit was struck down in *Clark* v. *Jeter*, 486 U.S. —, 100 L.Ed.2d 465 (1988). In both cases the Court pointed to the fact that increasingly sophisticated genetic tests are minimizing the "lurking problems with respect to proof of paternity" referred to in *Gomez*, 409 U.S. at 538. Also, the state's interest in imposing the 2-year limit was undercut by exceptions (e.g., for illegitimates receiving public assistance), and by different treatment for minors generally; similarly, the importance of imposing a 6-year limit was belied by that state's more recent enactment of a non-retroactive 18-year limit for paternity and support actions.

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[73] *See, e.g., Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984) (state prohibition on gender discrimination in aspects of public accommodation, as applied to membership in a civic organization, is justified by compelling state interest).

Fundamental Interests: The Political Process

— Voter Qualifications

[P. 1783, add to text following N.21:]

A less restrictive "closed primary" system was also invalidated, the Court finding insufficient justification for a state's preventing a political party from allowing independents to vote in its primary.[74]

— Access to the Ballot

[P. 1788, add to text following N.15:]

So too, a state may limit access to the general election ballot to candidates who received at least 1% of the primary votes cast for the particular office.[75]

[P. 1788, add to text following N.16:]

Also invalidated was a requirement that independent candidates for President and Vice-President file nominating petitions by March 20 in order to qualify for the November ballot.[76]

— Apportionment and Districting

[P. 1791, add to N.4:]

The Court has continued to adhere to this strict standard for congressional districting, voiding a plan in which the maximum deviation between largest and smallest district was 0.7%, or 3,674 persons. *Karcher* v. *Daggett*, 462 U.S. 725 (1983) (rejecting assertion that deviations less than estimated census error are necessarily permissible).

[P. 1792, add to N.9:]

In *Brown* v. *Thomson*, 462 U.S. 835 (1983), the Court held that a consistent state policy assuring each county at least one representative can justify substantial deviation from population equality when only the marginal impact of representation for the state's least populous county was challenged (the effect on plaintiffs, voters in larger districts, was that they would elect 28 of 64 members rather than 28 of 63), but there was indication in Justice O'Connor's concurring opinion that a broader-based challenge to the plan, which contained a 16% average deviation and an 89% maximum deviation, could have succeeded.

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[74] *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986). Although independents were allowed to register in a party on the day before a primary, the state's justifications for "protect[ing] the integrity of the Party against the Party itself" were deemed insubstantial. *Id.* at 224.

[75] *Munro* v. *Socialist Workers Party*, 479 U.S. 189 (1986).

[76] *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983). State interests in assuring voter education, treating all candidates equally (candidates participating in a party primary also had to declare candidacy in March), and preserving political stability, were deemed insufficient to justify the substantial impediment to independent candidates and their supporters.

[P. 1792, add to N.10:]

See also Brown v. *Thomson*, 462 U.S. 835, 842 (1983): "Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations [insufficient to make out a prima facie case]."

[P. 1792, add to N.11:]

By contrast, the Court has held that estimated margin of error for census statistics does not justify deviation from population equality in congressional districting. *Karcher* v. *Daggett*, 462 U.S. 725 (1983).

[P. 1793, add to text following N.14:]

In a decision of potentially major import reminiscent of *Baker* v. *Carr*, the Court in *Davis* v. *Bandemer*[77] ruled that partisan gerrymandering in state legislative redistricting is justiciable under the Equal Protection Clause. However, although the vote was 6 to 3 in favor of justiciability, a majority of Justices could not agree on the proper test for determining whether particular gerrymandering is unconstitutional, and the lower court's holding of unconstitutionality was reversed by vote of 7 to 2.[78] Thus, while courthouse doors are now ajar for claims of partisan gerrymandering, it is unclear what it will take to succeed on the merits. On the justiciability issue, the Court viewed the "political question" criteria as no more applicable than they had been in *Baker* v. *Carr*. Because *Reynolds* v. *Sims* had declared "fair and effective representation for all citizens" to be "the basic aim of legislative apportionment,"[79] and because racial gerrymandering issues had been treated as justiciable, the Court viewed the representational issues raised by partisan gerrymandering as indistinguishable. Agreement as to the exist-

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[77] 478 U.S. 109 (1986). The vote on justiciability was 6–3, with Justice White's opinion of the Court being joined by Justices Brennan, Marshall, Blackmun, Powell, and Stevens. This represented an apparent change of view by 3 of the majority Justices, who just 2 years earlier had denied that "the existence of noncompact or gerrymandered districts is by itself a constitutional violation." *Karcher* v. *Daggett*, 466 U.S. 910, 917 (1983) (Justice Brennan, joined by Justices White and Marshall, dissenting from denial of stay in challenge to district court's rejection of a remedial districting plan on the basis that it contained "an intentional gerrymander").

[78] Only Justices Powell and Stevens thought the Indiana redistricting plan void; Justice White, joined by Justices Brennan, Marshall, and Blackmun, thought the record inadequate to demonstrate continuing discriminatory impact, and Justice O'Connor, joined by Chief Justice Burger and by Justice Rehnquist, would have ruled that partisan gerrymandering is nonjusticiable as constituting a political question not susceptible to manageable judicial standards.

[79] 377 U.S. 533, 565–66 (1964). This phrase has had a life of its own in the commentary. *See* D. Alfange, Jr., "Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last," 1986 Sup. Ct. Rev. 175, and sources cited therein. It is not clear from its original context, however, that the phrase was coined with such broad application in mind.

ence of "judicially discoverable and manageable standards for resolving" gerrymandering issues, however, did not result in a consensus as to what those standards are.[80] While a majority of Justices agreed that discriminatory effect as well as discriminatory intent must be shown, there was significant disagreement as to what constitutes discriminatory effect. Justice White's plurality opinion suggested that there need be "evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." [81] Moreover, continued frustration of the chance to influence the political process can not be demonstrated by the results of only one election; there must be a history of disproportionate results or a finding that such results will continue. Justice Powell, joined by Justice Stevens, did not formulate a strict test, but suggested that "a heavy burden of proof" should be required, and that courts should look to a variety of factors as they relate to "the fairness of a redistricting plan" in determining whether it contains invalid gerrymandering. Among these factors are the shapes of the districts, adherence to established subdivision lines, statistics relating to vote dilution, the nature of the legislative process by which the plan was formulated, and evidence of intent revealed in legislative history.[82]

[P. 1795, add to N. 22:]

In *Thornburg* v. *Gingles*, 478 U.S. 30, 50–51 (1986), the Court held that multimember districting violates § 2 of the Voting Rights Act by diluting the voting power of a racial minority when that minority is "sufficiently large and geographically compact to constitute a majority in a single-member district," when it is politically cohesive, and when block voting by the majority "usually" defeats preferred candidates of the minority. Use of multimember districting for purposes of political gerrymandering was at issue in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), decided the same day as *Gingles*, but there was no agreement as to the appropriate constitutional standard. A plurality led by Justice White relied on the *Whitcomb* v. *Chavis* reasoning, suggesting that proof that multimember districts were constructed for the advantage of one political party falls short of the necessary showing of deprivation of opportunity to participate in the electoral process. 478 U.S. at 136–37. Two Justices thought the proof sufficient for a holding of invalidity, the minority party having won 46% of the vote but only 3 of 21 seats from the multimember districts, and "the only discernible pattern [being] the appearance of these districts in areas where their winner-take-all aspects can best be employed to debase [one party's] voting strength," (*id.*, at 179–80, Justices Powell and Stevens), and three Justices thought political gerrymandering claims to be nonjusticiable.

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[80] The quotation is from the *Baker* v. *Carr* measure for existence of a political question, 369 U.S. 186, 217 (1962).

[81] 478 U.S. at 133. Joining in this part of the opinion were Justices Brennan, Marshall, and Blackmun.

[82] 478 U.S. at 173. A similar approach had been proposed in Justice Stevens' concurring opinion in *Karcher* v. *Daggett*, 462 U.S. 725, 744 (1983).

[P. 1795, add to N.24:]

But see Karcher v. *Daggett*, 466 U.S. 910 (1983) (denying cert. over dissent's suggestion that court-adopted congressional districting plan had strayed too far from the structural framework of the legislature's invalidated plan).

The Right to Travel

— Durational Residency Requirements

[P. 1798, add to N.14:]

Somewhat similar was the Court's invalidation on equal protection grounds of a veterans preference for state employment limited to persons who were state residents when they entered military service; four Justices also thought the preference penalized the right to travel. *Attorney General of New York* v. *Soto-Lopez*, 476 U.S. 898 (1986).

[P. 1798, add to N.16:]

See also *Martinez* v. *Bynum*, 461 U.S. 321 (1983) (bona fide residency requirement for free tuition to public schools).

Marriage and Familial Relations

[P. 1800, add to N.7:]

Accord, *Lehr* v. *Robertson*, 463 U.S. 248 (1983).

Poverty and Fundamental Interests: The Intersection of Due Process and Equal Protection

— Generally

[P. 1803, add to text following N.8:]

The Court has reiterated that both due process and equal protection concerns are implicated by restrictions on indigents' exercise of the right of appeal. "In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal. Equal protection concerns were involved because the State treated a class of defendants—indigent ones—differently for purposes of offering them a meaningful appeal." [83]

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[83] *Evitts* v. *Lucey*, 469 U.S. 387, 405 (1985) (holding that due process requires that counsel provided for appeals as of right must be effective).

— Criminal Procedure

[P. 1803, add to N.15:]

A rule requiring a court-appointed appellate counsel to file a brief explaining reasons why he concludes that a client's appeal is frivolous does not violate the client's right to assistance of counsel on appeal. *Mc[illegible] v. Court of Appeals*, 486 U.S. —, 100 L.Ed.2d 440 (1988).

[P. 1803, add to text following N.15:]

The right to counsel on appeal necessarily means the right to *effective* assistance of counsel.[84]

[P. 1804, add to N.16:]

If a state provides counsel in postconviction proceedings, no violation of constitutional rights occurs if that counsel concludes that there are no arguable bases for collateral relief and so advises the court. *Pennsylvania* v. *Finley*, 481 U.S. —, 95 L.Ed.2d 539 (1987).

— The Criminal Sentence

[P. 1805, add to text as penultimate sentence of section:]

Similarly, a sentencing court in revoking probation must consider alternatives to incarceration if the reason for revocation is the inability of the indigent to pay a fine or restitution.[85]

— Educational Opportunity

[P. 1809, add to text at end of section:]

Relying on *Rodriguez* and distinguishing *Plyler*, the Court in *Kadrmas* v. *Dickinson Public Schools*[86] rejected an indigent student's equal protection challenge to a state statute permitting school districts to charge a fee for school bus service, in the process rejecting arguments that either "strict" or "heightened" scrutiny is appropriate. Moreover, the Court concluded, there is no constitutional obligation to provide bus transportation, or to provide it for free if it is provided at all.[87]

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[84] *Evitts* v. *Lucey*, 469 U.S. 387 (1985).

[85] *Bearden* v. *Georgia*, 461 U.S. 660 (1983).

[86] 487 U.S. —, 101 L.Ed.2d 399 (1988). This was a 5-4 decision, with Justice O'Connor's opinion of the Court being joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy, and with Justices Marshall, Brennan, Stevens, and Blackmun dissenting.

[87] 101 L.Ed.2d at 412. The plaintiff child nonetheless continued to attend school, so the requirement was reviewed as an additional burden but not a complete obstacle to her education.

FIFTEENTH AMENDMENT

Racial Gerrymandering

[P. 1827, add to N.25:]

The Supreme Court interpreted the 1982 amendments to § 2 in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), determining that Congress had effectively overruled the *City of Mobile* intent standard in returning to a "totality of the circumstances" results test.

[P. 1834, add to N.13:]

Without any discussion of the Fifteenth Amendment, the Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), interpreted and applied the "totality of the circumstances" test in the context of multimember districting.

TWENTY-FIRST AMENDMENT

Scope of Regulatory Power Conferred Upon the States

— Discrimination as Between Domestic and Imported Products

[P. 1865, add new paragraph at end of section:]

Recent cases have undercut the expansive interpretation of state powers in the *Young's Market* and *Triner Corp.* cases. Twenty-first Amendment and Commerce Clause principles are to be harmonized where possible. The Court now phrases the question in terms of "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." [1] "[T]he central power reserved by § 2 of the Twenty-first Amendment [is] that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' " [2] Because "[t]he central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition," the "central tenet" of the Commerce Clause will control to invalidate "mere economic protectionism," at least where the state cannot justify its tax or regulation as "designed to promote temperance or to carry out any other purpose of the . . . Amendment." [3]

— Foreign Imports, Exports; Taxation, Regulation

[P. 1867, add to text following N.19:]

Similarly, a state "affirmation law" prohibiting wholesalers from charging lower prices on out-of-state sales than those already approved for in-state sales is invalid as a direct regulation of interstate commerce. "The Commerce Clause operates with full force whenever one State attempts to regulate the transportation and

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[1] *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 714 (1984).

[2] 467 U.S. at 715 (quoting *California Retail Liquor Dealers Ass'n.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

[3] *Bacchus Imports, Ltd.*, v. *Dias*, 468 U.S. 263, 276 (1984). *See also Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986) (attempt to regulate prices of out-of-state sales); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984) (state's limited interest in banning wine commercials carried on cable TV while permitting various other forms of liquor advertisement is outweighed by federal interest in promoting access to cable TV); and *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987) (retail price maintenance in violation of Sherman Act).

sale of alcoholic beverages destined for distribution and consumption in a foreign country . . . or another State." [4]

— Effect of Section 2 Upon Other Constitutional Provisions

[P. 1867, add to text following N.24:]

Similarly, a state "may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." [5]

[P. 1868, add to N.4:]

And for utilization of the argument in the commercial speech context, *see Posadas de Puerto Rico Associates* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 345–46 (1986). *But see Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), not addressing the commercial speech issue but holding state regulation of liquor advertisements on cable TV to be preempted, in spite of the Twenty-first Amendment, by federal policies promoting access to cable TV).

— Effect on Federal Regulation

[P. 1169, add new paragraph to end of section:]

Congress may condition receipt of federal highway funds on a state's agreeing to raise the minimum drinking age to 21, the Twenty-first Amendment not constituting an "independent constitutional bar" to this sort of spending power exercise even though Congress may lack the power to achieve its purpose directly.[6]

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[4] *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 585 (1986) (citation omitted).

[5] *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982).

[6] *South Dakota* v. *Dole*, 483 U.S. —, 97 L.Ed.2d 171 (1987).

ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

113. Act of March 3, 1873 (ch. 258, § 2, 17 Stat. 599, recodified in 39 U.S.C. § 3001(e)(2)).

Comstock Act provision barring from the mails any unsolicited advertisement for contraceptives, as applied to circulars and flyers promoting prophylactics or containing information discussing the desirability and availability of prophylactics, violates the free speech clause of the First Amendment.

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983).

Justices concurring: Marshall, White, Blackmun, Powell, and Chief Justice Burger.

Justices concurring specially: Rehnquist and O'Connor; Stevens.

114. Act of Feb. 15, 1938, ch. 29, 52 Stat. 30.

District of Columbia Code § 22-1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into "public odium" or "public disrepute," violates the First Amendment.

Boos v. *Barry*, 485 U.S. —, 99 L.Ed.2d 333 (1988).

Justices concurring: O'Connor, Brennan, Marshall, Stevens, Scalia.

Justices dissenting: Chief Justice Rehnquist, and White and Blackmun.

115. Act of August 18, 1949 (ch. 479, § 6, 63 Stat. 617, 40 U.S.C. § 13k).

Provision, insofar as it applies to the public sidewalks surrounding the Supreme Court building, which bars the display of any flag, banner, or device designed to bring into public notice any party, organization, or movement, violates the free speech clause of the First Amendment.

United States v. *Grace*, 461 U.S. 171 (1983).

Justices concurring: White, Brennan, Blackmun, Powell, Rehnquist, O'Connor, and Chief Justice Burger.

Justices concurring specially: Marshall and Stevens.

116. Act of June 27, 1952 (ch. 477, § 244(e)(2), 66 Stat. 214, 8 U.S.C. § 1254 (c)(2).

Provision of the immigration law that permits either House of Congress to veto the decision of the Attorney General to suspend the deportation of certain aliens violates the bicameralism and presentation requirements of lawmaking imposed upon Congress by Article I, §§ 1 and 7.

INS v. *Chadha*, 462 U.S. 919 (1983).
Justices concurring: Chief Justice Burger, and Brennan, Marshall, Blackmun, and Stevens.
Justice concurring specially: Powell.
Justices dissenting: Rehnquist and White.

117. Act of September 2, 1958 (Pub. L. 85-921, § 1, 72 Stat. 1771, 18 U.S.C. § 504(1)).

Exemptions from ban on photographic reproduction of currency "for philatelic, numismatic, educational, historical, or newsworthy purposes" violates the First Amendment because it discriminates on the basis of the content of a publication.

Regan v. *Time, Inc.*, 468 U.S. 641 (1984).
Justices concurring: White, Brennan, Blackmun, Marshall, Powell, Rehnquist, O'Connor, and Chief Justice Burger.
Justice dissenting: Stevens.

118. Act of November 7, 1967 (Pub. L. 90-129, § 201(8), 81 Stat. 368), as amended by Act of August 13, 1981 (Pub. L. 97-35, § 1229, 95 Stat. 730, 47 U.S.C. § 399).

Communications Act provision banning noncommercial educational stations receiving grants from the Corporation for Public Broadcasting from engaging in editorializing violates the First Amendment.

FCC v. *League of Women Voters*, 468 U.S. 364 (1984).
Justices concurring: Brennan, Marshall, Blackmun, Powell, and O'Connor.
Justices dissenting: White, Rehnquist, Stevens, and Chief Justice Burger.

119. Act of December 10, 1971 (Pub. L. 92-178, § 801, 85 Stat. 570, 26 U.S.C § 9012(f)).

Provision of Presidential Election Campaign Fund Act limiting to $1,000 the amount that independent committees may expend to further the election of a presidential candidate financing his campaign with public funds is an impermissible limitation of freedom of speech and association protected by the First Amendment.

FEC v. *National Conservative Political Action Comm.*, 470 U.S. 480 (1985).
Justices concurring: Rehnquist, Brennan, Blackmun, Powell, O'Connor, Stevens, and Chief Justice Burger.
Justices dissenting: White and Marshall.

120. Act of May 11, 1976, Pub. L. 92-225, § 316, 90 Stat. 490, 2 U.S.C. § 441b.

Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions to a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union.

FEC v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).
Justices concurring: Brennan, Marshall, Powell, and Scalia.
Justice concurring specially: O'Connor.
Justices dissenting: Chief Justice Rehnquist, and Justices White, Blackmun, and Stevens.

121. Act of November 9, 1978 (Pub. L. 95-621, § 202(c)(1), 92 Stat. 3372, 15 U.S.C. § 3342(c)(1).

Decision of Court of Appeals holding unconstitutional provision giving either House of Congress power to veto rules of Federal Energy Regulatory Commission on certain natural gas pricing matters is summarily affirmed on the authority of *Chadha*.

Process Gas Consumers Group v. *Consumer Energy Council*, 463 U.S. 1216 (1983).

122. Act of May 28, 1980 (Pub. L. 96-252, § 21(a), 94 Stat. 393, 15 U.S.C. § 57a-1(a)).

Decision of Court of Appeals holding unconstitutional provision of FTC Improvements Act giving Congress power by concurrent resolution to veto final rules of the FTC is summarily affirmed on the basis of *Chadha*.

United States Senate v. *FTC*, 463 U.S. 1216 (1983).

123. Act of Jan. 12, 1983, Pub. L. 97-459, § 207, 96 Stat. 2519, 25 U.S.C. § 2206.

Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates the Fifth Amendment's takings clause by completely abrogating rights of intestacy and devise.

Hodel v. *Irving*, 481 U.S. —, 107 S. Ct. 2076, 95 L.Ed.2d 668 (1987).
Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, Scalia, and Chief Justice Rehnquist.
Justices concurring specially: Stevens and White.

124. Act of December 12, 1985 (Pub. L. 99-177, § 251, 99 Stat. 1063, 2 U.S.C. § 901.

That portion of the Balanced Budget and Emergency Deficit Control Act which authorizes the Comptroller General to determine the amount of spending reductions which must be accomplished each year to reach congressional targets and which authorizes him to report a figure to the President which the President must implement violates the constitutional separation of powers inasmuch as the Comptroller General is subject to congressional control (removal) and cannot be given a role in the execution of the laws.

Bowsher v. *Synar*, 478 U.S. 714 (1986).
Justices concurring: Chief Justice Burger, and Brennan, Powell, Rehnquist, and O'Connor.

Justices concurring specially: Stevens and Marshall.
Justices dissenting: White and Blackmun.

STATE ACTS HELD UNCONSTITUTIONAL

974. *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).

Ohio statute requiring candidates to disclose the names and addresses of campaign contributors and the recipients of campaign expenditures is invalid, under the First Amendment, as applied to a minor political party whose members and supporters may be subjected to harassment or reprisals.

Justices concurring: Marshall, Brennan, White, Powell, and Chief Justice Burger.

Justice concurring specially: Blackmun.

Justices concurring in part and dissenting in part: O'Connor, Rehnquist, and Stevens.

975. *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982).

Massachusetts statute permitting any church to block issuance of a liquor license to any establishment to be located within 500 feet of the church violates the Establishment Clause by delegating governmental decisionmaking to a church.

Justices concurring: Chief Justice Burger, and Brennan, White, Marshall, Blackmun, Powell, and Stevens.

Justice dissenting: Rehnquist.

976. *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392 (1983).

Tennessee tax on the net earnings of banks, applied to interest earned on obligations of the United States, is void under the Supremacy Clause as conflicting with 31 U.S.C. § 3124.

977. *King* v. *Sanchez*, 459 U.S. 801 (1982).

Federal district court's decision invalidating New Mexico legislative reapportionment as violating the one person, one vote requirement of the Equal Protection Clause because the "votes cast" formula resulted in substantial population variances among districts, is summarily affirmed.

978. *Busbee* v. *Georgia*, 459 U.S. 1166 (1983).

Federal district court decision that Georgia congressional redistricting plan is invalid as having a racially discriminatory purpose in conflict with the Voting Rights Act is summarily affirmed.

979. *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983).

Minnesota ink and paper use tax violates the First Amendment by providing "differential treatment" for the press.

Justices concurring: O'Connor, Brennan, Marshall, Powell, Stevens, and Chief Justice Burger.

Justices concurring specially: White and Blackmun.

Justice dissenting: Rehnquist.

980. *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983).

Ohio statute requiring independent candidates for President and Vice-President to file nominating petitions by March 20 in order to qualify for the November ballot is unconstitutional as substantially burdening the associational rights of the candidates and their supporters.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, and Chief Justice Burger.

Justices dissenting: Rehnquist, White, Powell, and O'Connor.

981. *Kolender* v. *Lawson*, 461 U.S. 352 (1983).

California statute requiring that a person detained in a valid *Terry* stop provide "credible and reliable" identification is unconstitutionally vague in violation of the Fourteenth Amendment Due Process Clause.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, Powell, and Stevens.

Justices dissenting: White and Rehnquist.

982. *Pennsylvania Public Utility Comm'n* v. *CONRAIL*, 461 U.S. 912 (1983).

Federal district court decision holding that federal statutes (the Federal Railroad Safety Act and the locomotive boiler inspection laws) preempt a Pennsylvania law requiring locomotives to maintain speed records and indicators, summarily affirmed by an appeals court, is summarily affirmed.

983. *Pickett* v. *Brown*, 462 U.S. 1 (1983).

Tennessee's two-year statute of limitations for paternity and child support actions violates the equal protection rights of illegitimates.

984. *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983).

Prohibition on pass-through to consumers of increase in Alabama oil and gas severance tax is invalid as conflicting with the Natural Gas Act to the extent that it applies to sales of gas in interstate commerce.

985. *Philco Aviation* v. *Shacket*, 462 U.S. 406 (1983).

Illinois statute recognizing the validity of an unrecorded, oral sale of an aircraft is preempted by the Federal Aviation Act's provision that unrecorded "instruments" of transfer are invalid.

986. *Planned Parenthood Ass'n* v. *Ashcroft*, 462 U.S. 476 (1983).

Missouri statute requiring that all abortions performed after the first trimester of pregnancy be performed in a hospital unreasonably infringes upon the right of a woman to have an abortion.

Justices concurring (on this issue only): Powell, Brennan, Marshall, Blackmun, Stevens, and Chief Justice Burger.

Justices dissenting: O'Connor, White, and Rehnquist.

987. *Karcher* v. *Daggett*, 462 U.S. 725 (1983).

New Jersey congressional districting statute creating districts in which the deviation between largest and smallest districts was 0.7%, or 3,674 persons, violates Art. I, § 2's "equal representation" requirement as not resulting from a good-faith effort to achieve population equality.

Justices concurring: Brennan, Marshall, Blackmun, Stevens, and O'Connor.

Justices dissenting: White, Powell, Rehnquist, and Chief Justice Burger.

988. *Mennonite Bd. of Missions* v. *Adams*, 462 U.S. 791 (1983).

Indiana statute providing for constructive notice to mortgagee of tax sale of real property violates the Due Process Clause of the Fourteenth Amendment; instead, personal service or notice by mail is required.

Justices concurring: Marshall, Brennan, White, Blackmun, Stevens, and Chief Justice Burger.

Justices dissenting: O'Connor, Powell, and Rehnquist.

989. *Shaw* v. *Delta Airlines*, 463 U.S. 85 (1983).

The New York Human Rights Law is preempted by ERISA to the extent that it prohibits practices that are lawful under the federal law.

990. *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855 (1983).

Texas property tax on bank shares, computed on the basis of a bank's net assets without any deduction for the value of United States obligations held by the bank, is invalid as conflicting with Rev. Stat. § 3701 (31 U.S.C. § 3124).

Justices concurring: Blackmun, Brennan, White, Marshall, Powell, and Chief Justice Burger.

Justices dissenting: Rehnquist and Stevens.

991. *Arcudi* v. *Stone & Webster Engineering*, 463 U.S. 1220 (1983).

Appeals court holding that Connecticut statute requiring employers to provide health and life insurance to former employees is preempted by ERISA as related to an employee benefit plan, is summarily affirmed.

992. *Aloha Airlines* v. *Director of Taxation*, 464 U.S. 7 (1983).

Hawaii "property tax" on the gross income of airlines operating within the State is preempted by a federal prohibition on state taxes on carriage of air passengers "or on the gross receipts derived therefrom."

993. *Healy* v. *United States Brewers Ass'n*, 464 U.S. 909 (1983).

Appeals court decision invalidating as an undue burden on interstate commerce the beer price "affirmation" provisions of Connecticut's liquor control laws, which restrict out-of-state sales to prices set for in-state sales, is summarily affirmed.

994. *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984).

California franchise law, requiring judicial resolution of certain claims, is preempted by the United States Arbitration Act, which precludes judicial resolution in state or federal courts of claims contracting parties agree to submit to arbitration.

Justices concurring: Chief Justice Burger, and Brennan, Marshall, Blackmun, and Powell.

Justice concurring in part and dissenting in part: Stevens.

Justices dissenting: O'Connor and Rehnquist.

995. *Texas* v. *KVUE-TV*, 465 U.S. 1092 (1984).

Appeals court holding that Texas statute regulating broadcast of political advertisements is preempted by the Federal Election Campaign Act of 1971 to the extent that it imposes sponsorship identification requirements on advertising for candidates for federal office, and to the extent that it conflicts with federal regulation of political advertising rates, is summarily affirmed.

996. *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984).

New York corporate franchise tax unconstitutionally discriminates against interstate commerce by allowing an offsetting credit for receipts from products shipped from an in-state place of business.

997. *Wallace* v. *Jaffree*, 466 U.S. 924 (1984).

Appeals court decision holding invalid under the Establishment Clause an Alabama statute authorizing the recitation in public schools of a government-composed prayer is summarily affirmed.

998. *Bernal* v. *Fainter*, 467 U.S. 216 (1984).

Texas requirement that a notary public be a United States citizen furthers no compelling state interest and denies equal protection of the laws to resident aliens.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Stevens, O'Connor, and Chief Justice Burger.

Justice dissenting: Rehnquist.

999. *Michigan Canners & Freezers Ass'n* v. *Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461 (1984).

Michigan statute making agricultural producers' associations the exclusive bargaining agents and requiring payment of service fees by non-member producers is preempted as conflicting with federal policy of the Agricultural Fair Practices Act of 1967, protecting the right of farmers to join or not join such associations.

1000. *Armco, Inc.* v. *Hardesty*, 467 U.S. 638 (1984).

West Virginia gross receipts tax on businesses selling tangible property at wholesale unconstitutionally discriminates against interstate commerce due to exemption granted local manufacturers.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, and Chief Justice Burger.
Justice dissenting: Rehnquist.

1001. *Capital Cities Cable* v. *Crisp*, 467 U.S. 691 (1984).

Oklahoma Constitution's general ban on advertising of alcoholic beverages, as applied to out-of-state cable television signals carried by in-state operators, is preempted by federal regulations implementing the Communications Act.

1002. *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Maryland prohibition on charitable organizations paying more than 25% of solicited funds for expenses of fundraising violates the Fourteenth Amendment by creating an unnecessary risk of chilling protected First Amendment activity.

Justices concurring: Blackmun, Brennan, White, Marshall, and Stevens.
Justices dissenting: Rehnquist, Powell, O'Connor, and Chief Justice Burger.

1003. *Brown* v. *Brandon*, 467 U.S. 1223 (1984).

Federal district court decision that Ohio congressional districting plan is invalid because population variances were shown to be not unavoidable and were not justified by legitimate state interest is summarily affirmed.

1004. *Bacchus Imports* v. *Dias*, 468 U.S. 263 (1984).

Hawaii excise tax on wholesale liquor sales, exempting sales of specified local products, violates Commerce Clause by discriminating in favor of local commerce.

1005. *Lawrence County* v. *Lead-Deadwood School Dist.*, 469 U.S. 256 (1985).

South Dakota statute requiring local governments to distribute federal payments in lieu of taxes in the same manner that they distribute general tax revenues conflicts with the Payment in Lieu of

Taxes Act, which provides that the recipient local government may use the payment for any governmental purpose.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, O'Connor, and Chief Justice Burger.

Justices dissenting: Rehnquist and Stevens.

1006. *Deukmejian* v. *National Meat Ass'n*, 469 U.S. 1100 (1985).

Appeals court holding that California tax on sales by out-of-state beef processors discriminates against interstate commerce in violation of the Commerce Clause, there being no corresponding and comparable tax on in-state processors, is summarily affirmed.

1007. *Westhafer* v. *Worrell Newspapers*, 469 U.S. 1200 (1985).

Appeals court decision holding invalid under the First Amendment an Indiana statute punishing as contempt the publication of the name of an individual against whom a sealed indictment or information has been filed is summarily affirmed.

1008. *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869 (1985).

Alabama's domestic preference tax, imposing a substantially lower gross premiums tax rate on domestic insurance companies than on out-of-state insurance companies, violates the Equal Protection Clause.

Justices concurring: Powell, White, Blackmun, Stevens, and Chief Justice Burger.

Justices dissenting: O'Connor, Brennan, Marshall, and Rehnquist.

1009. *Board of Educ.* v. *National Gay Task Force*, 470 U.S. 903 (1985).

Court of appeals decision holding unconstitutionally overbroad in violation of the First and Fourteenth Amendments an Oklahoma statute prohibiting advocating, encouraging, or promoting homosexual conduct is affirmed by equally divided vote.

1010. *Hunter* v. *Underwood*, 471 U.S. 222 (1985).

Provision of Alabama Constitution requiring disenfranchisement for crimes involving moral turpitude, adopted in 1901 for the purpose of racial discrimination, violates the Equal Protection Clause.

1011. *Williams* v. *Vermont*, 472 U.S. 14 (1985).

Vermont use tax discriminating between residents and nonresidents in application of a credit for automobile sales taxes paid to another state violates the Equal Protection Clause.

Justices concurring: White, Brennan, Marshall, Stevens, and Chief Justice Burger.

Justices dissenting: Blackmun, Rehnquist, and O'Connor.

1012. *Wallace* v. *Jaffree*, 472 U.S. 38 (1985).

Alabama statute authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer" violates the Establishment Clause, the record indicating that the sole legislative purpose in amending the statute to add "or voluntary prayer" was to return voluntary prayer to the public schools.

Justices concurring: Stevens, Brennan, Marshall, Blackmun, and Powell.
Justice concurring specially: O'Connor.
Justices dissenting: White, Rehnquist, and Chief Justice Burger.

1013. *Jensen* v. *Quaring*, 472 U.S. 478 (1985).

Appeals court decision holding invalid Nebraska's driver's licensing requirement that applicant be photographed, and that photo be affixed to license, as burdening the free exercise of sincerely held religious beliefs against submitting to being photographed, is affirmed by equally divided vote.

1014. *Brockett* v. *Spokane Arcades*, 472 U.S. 491 (1985).

Washington "moral nuisance" statute is invalid under the First Amendment to the extent that it proscribes exhibition of films or sale of publications inciting "lust," defined as referring to normal sexual desires.

Justices concurring: White, Blackmun, Rehnquist, Stevens, O'Connor, and Chief Justice Burger.
Justices dissenting on other grounds: Brennan and Marshall.

1015. *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985).

New Mexico property tax exemption for Vietnam War veterans who became residents before May 8, 1976, violates the Equal Protection Clause as not meeting the rational basis test.

Justices concurring: Chief Justice Burger and Brennan, White, Marshall, and Blackmun.
Justices dissenting: Stevens, Rehnquist, and O'Connor.

1016. *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703 (1985).

Connecticut statute requiring employers to honor the Sabbath day of the employee's choice violates the Establishment Clause.

Justices concurring: Chief Justice Burger and Brennan, White, Marshall, Blackmun, Powell, Stevens, and O'Connor.
Justice dissenting: Rehnquist.

1017. *Gerace* v. *Grocery Mfrs. of America*, 474 U.S. 801 (1985).

Appeals court decision holding that federal laws (the Food, Drug, and Cosmetic Act; the Meat Inspection Act; and the Poultry Products Act) preempt a New York requirement that cheese alternatives be labeled "imitation" is summarily affirmed.

1018. *Wisconsin Dep't of Industry* v. *Gould, Inc.*, 475 U.S. 282 (1986).

Wisconsin statute debarring from doing business with the state persons or firms guilty of repeat violations of the National Labor Relations Act is preempted by that Act.

1019. *Exxon Corp.* v. *Hunt*, 475 U.S. 355 (1986).

New Jersey statute creating an oil spill compensation fund is preempted in part by the Comprehensive Environmental Response, Compensation, and Liability Act to the extent that the state fund is used to finance cleanup activities at sites listed in the National Contingency Plan.

Justices concurring: Marshall, Brennan, White, Blackmun, Rehnquist, O'Connor, and Chief Justice Burger.
Justice dissenting: Stevens.

1020. *Philadelphia Newspapers* v. *Hepps*, 475 U.S. 767 (1986).

Pennsylvania statute incorporating the common law rule that defamatory statements are presumptively false violates the First Amendment as applied to a libel action brought by a private figure against a media defendant; instead, the plaintiff must bear the burden of establishing falsity.

Justices concurring: O'Connor, Brennan, Marshall, Blackmun, and Powell.
Justices dissenting: Stevens, White, Rehnquist, and Chief Justice Burger.

1021. *Brown-Forman Distillers* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986).

New York affirmation law, having the practical effect of controlling liquor prices in other states, violates the Commerce Clause.

Justices concurring: Marshall, Powell, O'Connor, and Chief Justice Burger.
Justice concurring specially: Blackmun.
Justices dissenting: Stevens, White, and Rehnquist.

1022. *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986).

Pennsylvania statute prescribing a variety of requirements for performance of an abortion, including informed consent, reporting of various information concerning the mother's history and condition, and standard-of-care and second-physician requirements after viability, infringes a woman's *Roe* v. *Wade* right to have an abortion.

Justices concurring: Blackmun, Brennan, Marshall, Powell, and Stevens.
Justices dissenting: Chief Justice Burger, and White, Rehnquist, and O'Connor.

1023. *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877 (1986).

North Dakota statute disclaiming jurisdiction over actions brought by tribal Indians suing non-Indians in state courts over

claims arising in Indian country is preempted by federal Indian law (Pub. L. 280).

Justices concurring: O'Connor, White, Marshall, Blackmun, Powell, and Chief Justice Burger.
Justices dissenting: Rehnquist, Brennan, and Stevens.

1024. *Attorney General of New York* v. *Soto-Lopez*, 476 U.S. 898 (1986).

New York Civil Service Law employment preference for New York residents who are honorably discharged veterans and were New York residents when they entered military service violates the Equal Protection Clause.

Justices concurring: Brennan, Marshall, Blackmun, and Powell.
Justices concurring specially: White and Chief Justice Burger.
Justices dissenting: Stevens, O'Connor, and Rehnquist.

1025. *Offshore Logistics* v. *Tallentire*, 477 U.S. 207 (1986).

Louisiana's wrongful death statute is preempted by the Death on the High Seas Act as applied to helicopter crash 35 miles off shore.

Justices concurring: O'Connor, White, Blackmun, Rehnquist, and Chief Justice Burger.
Justices dissenting: Powell, Brennan, Marshall, and Stevens.

1026. *Roberts* v. *Burlington Industries*, 477 U.S. 901 (1986).

Appeals court holding that New York severance pay requirements were preempted by ERISA is summarily affirmed.

1027. *Brooks* v. *Burlington Industries*, 477 U.S. 901 (1986).

Appeals court holding that North Carolina severance pay requirements were preempted by ERISA is summarily affirmed.

1028. *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

North Carolina legislative redistricting plan, creating multimember districts having the effect of impairing the opportunity of black voters to participate in the political process, is invalid under § 2 of the Voting Rights Act.

Justices concurring: Brennan, White, Marshall, Blackmun, and Stevens.
Justices concurring specially: O'Connor, Powell, Rehnquist, and Chief Justice Burger.
Justices concurring in part and dissenting in part: Stevens, Marshall, and Blackmun.

1029. *Rose* v. *Arkansas State Police*, 479 U.S. 1 (1986).

A provision of Arkansas' workers' compensation act requiring that death benefits be reduced by the amount of any federal benefits paid is preempted by federal requirement that federal benefits be "in addition to any other benefit due"; a contrary ruling by an Arizona appeals court is summarily reversed.

1030. *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208 (1986).

Connecticut statute imposing a "closed primary" under which persons not registered with a political party may not vote in its primaries violates the First and Fourteenth Amendments by preventing political parties from entering into political association with individuals of their own choosing.

Justices concurring: Marshall, Brennan, White, Blackmun, and Powell.
Justices dissenting: Stevens, Scalia, O'Connor, and Chief Justice Rehnquist.

1031. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335 (1987).

Section of New York's alcoholic beverage control law establishing retail price maintenance violates section 1 of the Sherman Act, and is not saved by the Twenty-first Amendment.

1032. *Babbitt* v. *Planned Parenthood*, 479 U.S. 925 (1986).

Appeals court decision invalidating Arizona statute prohibiting grant of public funds to any organization performing abortion-related services is summarily affirmed.

1033. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

California statute governing the operation of bingo games is preempted as applied to Indian tribes conducting on-reservation games.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, and Chief Justice Rehnquist.
Justices dissenting: Stevens, O'Connor, and Scalia.

1034. *Wilkinson* v. *Jones*, 480 U.S. 926 (1987).

Appeals court decision holding unconstitutionally vague and overbroad Utah statute barring cable television systems from showing "indecent material" is summarily affirmed.

1035. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. —, 95 L.Ed.2d 209 (1987).

Arkansas sales tax exemption for newspapers and for "religious, professional, trade, and sports journals" published within the state violates the First and Fourteenth Amendments as a content-based regulation of the press.

1036. *Miller* v. *Florida*, 482 U.S. —, 96 L.Ed.2d 351 (1987).

Florida's revised sentencing guidelines law, under which the presumptive sentence for certain offenses was raised, contravenes the ex post facto clause of Article I as applied to someone who committed those offenses before the revision.

1037. *Perry* v. *Thomas*, 482 U.S. —, 96 L.Ed.2d 426 (1987).

Federal Arbitration Act preempts section of California Labor Code providing that actions for collection of wages may be maintained

"without regard to the existence of any private agreement to arbitrate."

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, Scalia, and Chief Justice Rehnquist.
Justices dissenting: Stevens and O'Connor.

1038. *Booth* v. *Maryland*, 482 U.S. —, 96 L.Ed.2d 440 (1987).

Maryland statute requiring preparation of a "victim impact statement" describing the effect of a crime on a victim and his family violates the Eighth Amendment to the extent that it requires introduction of the statement at the sentencing phase of a capital murder trial.

Justices concurring: Powell, Brennan, Marshall, Blackmun, and Stevens.
Justices dissenting: White, O'Connor, Scalia, and Chief Justice Rehnquist.

1039. *Edwards* v. *Aguillard*, 483 U.S. —, 96 L.Ed.2d 510 (1987).

Louisiana statute mandating balanced treatment of "creation-science" and "evolution-science" in the public schools is an invalid establishment of religion in violation of the First Amendment.

Justices concurring: Brennan, Marshall, Powell, Stevens, and O'Connor.
Justice concurring specially: White.
Justices dissenting: Scalia and Chief Justice Rehnquist.

1040. *Sumner* v. *Shuman*, 483 U.S. —, 107 S. Ct. 2716, 97 L.Ed.2d 56 (1987).

Nevada statute under which a prison inmate convicted of murder while serving a life sentence without possibility of parole is automatically sentenced to death is invalid under the Eighth Amendment as preventing the sentencing authority from considering as mitigating factors aspects of a defendant's character or record.

Justices concurring: Blackmun, Brennan, Marshall, Powell, Stevens, and O'Connor.
Justices dissenting: White, Scalia, and Chief Justice Rehnquist.

1041. *Tyler Pipe Indus.* v. *Washington State Dep't of Revenue*, 483 U.S. —, 97 L.Ed.2d 199 (1987).

Washington manufacturing tax, applicable to products manufactured in-state and sold out-of-state, but containing an exemption for products manufactured and sold in-state, discriminates against interstate commerce in violation of the Commerce Clause.

1042. *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. —, 97 L.Ed.2d 226 (1987).

Pennsylvania statutes imposing lump-sum annual taxes on operation of trucks on state's roads violate the Commerce Clause as discriminating against interstate commerce.

1043. *Hartigan* v. *Zbaraz*, 484 U.S. —, 98 L.Ed.2d 478 (1987).

Federal appeals court ruling holding unconstitutional a provision of the Illinois Parental Notice Abortion Act requiring that minors wait 24 hours after informing parents before having an abortion is affirmed by equally divided vote.

1044. *Montana* v. *Crow Tribe of Indians*, 108 S. Ct. 685 (1988).

Federal appeals court decision that Montana coal severance and gross proceeds taxes, as applied to Indian-owned coal produced by non-Indians, are preempted by federal Indian policies underlying the Mineral Leasing Act of 1938, is summarily affirmed.

1045. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. —, 99 L.Ed.2d 316 (1988).

Michigan statute requiring approval of Michigan Public Service Commission before a natural gas company may issue long-term securities is preempted as applied to companies subject to FERC regulation under the Natural Gas Act.

1046. *Bennett* v. *Arkansas*, 485 U.S. —, 99 L.Ed.2d 455 (1988).

Arkansas statute authorizing seizure of prisoners' property in order to defray costs of incarceration is invalid as applied to Social Security benefits, exempted from legal process by 42 U.S.C. § 407(a).

1047. *City of Manassas* v. *United States*, 99 L.Ed.2d 884 (1988).

Federal appeals court decision invalidating as discriminatory against the United States a Virginia statute that imposes a personal property tax on property leased from the United States, but not on property leased from the Virginia Port Authority or from local transportation districts, is summarily affirmed.

1048. *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. —, 100 L.Ed.2d 302 (1988).

Ohio statute granting a tax credit for ethanol fuel if the ethanol was produced in Ohio, or if produced in another state which grants a similar credit to Ohio-produced ethanol fuel, discriminates against interstate commerce in violation of the Commerce Clause.

1049. *Maynard* v. *Cartwright*, 486 U.S. —, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988).

Oklahoma statutory aggravating circumstances, permitting imposition of capital punishment upon a jury's finding that a murder was "especially heinous, atrocious, or cruel," are unconstitutionally vague in violation of the Eighth Amendment.

1050. *Meyer* v. *Grant*, 486 U.S. —, 100 L.Ed.2d 425 (1988).

Colorado law punishing as felony the payment of persons who circulate petitions for ballot initiative abridges the right to engage in political speech, hence violates First and Fourteenth Amendments.

1051. *Clark* v. *Jeter*, 486 U.S. —, 100 L.Ed.2d 465 (1988).

Pennsylvania 6-year statute of limitations for paternity actions violates the Equal Protection Clause as insufficiently justified under heightened scrutiny review.

1052. *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. —, 100 L.Ed.2d 475 (1988).

Kentucky Supreme Court's rule containing categorical prohibition of attorney direct mail advertising targeted at persons known to face particular legal problems violates First and Fourteenth Amendments.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens, and Kennedy.

Justices dissenting: O'Connor, Scalia, and Chief Justice Rehnquist.

1053. *Bendix Autolite Corp.* v. *Midwesco Enterprises, Inc.*, 108 S. Ct. 2218 (1988).

Ohio statute tolling its 4-year limitations period for breach of contract and fraud actions brought against out-of-state corporations that do not appoint an agent for service of process within the state—and thereby subject themselves to the general jurisdiction of Ohio courts—violates the Commerce Clause.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, and O'Connor.

Justice concurring specially: Scalia.

Justice dissenting: Chief Justice Rehnquist.

1054. *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 108 S. Ct. 2182 (1988).

Georgia statute barring garnishment of funds or benefits of employee benefit plans subject to ERISA is preempted by ERISA § 514(a) as a state law that "relates to" covered plans.

Justices concurring: White, Brennan, Marshall, Stevens, and Chief Justice Rehnquist.

Justices dissenting: Kennedy, Blackmun, O'Connor, and Scalia.

1055. *Supreme Court of Virginia* v. *Friedman*, 487 U.S. —, 101 L.Ed.2d 56 (1988).

Virginia Supreme Court rule imposing residency requirement for admission to the bar on motion, without taking the bar exam, by persons licensed to practice law in other jurisdictions, violates the Privileges and Immunities Clause of Article IV, § 2.

Justices concurring: Kennedy, Brennan, White, Marshall, Blackmun, Stevens, and O'Connor.

Justices dissenting: Chief Justice Rehnquist and Justice Scalia.

1056. *Felder* v. *Casey*, 487 U.S. —, 101 L.Ed.2d 123 (1988).

Wisconsin's notice-of-claim statute, requiring that persons suing state or local governments or officials in state court must give notice and then refrain from filing suit for an additional period, is preempted as applied to civil rights actions brought in state court under 42 U.S.C. § 1983.

Justices concurring: Brennan, White, Marshall, Blackmun, Stevens, Scalia, and Kennedy.

Justices dissenting: O'Connor and Chief Justice Rehnquist.

1057. *Thompson* v. *Oklahoma*, 487 U.S. —, 108 S. Ct. 2687, 101 L.Ed.2d 702 (1988).

Oklahoma statutory scheme, setting no minimum age for capital punishment, and separately providing that juveniles may be tried as adults, violates Eighth Amendment by permitting capital punishment to be imposed for crimes committed before age 16.

Justices concurring: Stevens, Brennan, Marshall, and Blackmun.

Justice concurring specially: O'Connor.

Justices dissenting: Scalia, White, and Chief Justice Rehnquist.

1058. *Coy* v. *Iowa*, 487 U.S. —, 101 L.Ed.2d 857 (1988).

Iowa procedure, authorized by statute, placing a one-way screen between defendant and complaining child witnesses in sex abuse cases, thereby sparing witnesses from viewing defendant, violates the Confrontation Clause right to face-to-face confrontation with one's accusers.

Justices concurring: Scalia, Brennan, White, Marshall, Stevens, and O'Connor.

Justices dissenting: Blackmun, and Chief Justice Rehnquist.

1059. *Riley* v. *National Federation of the Blind*, 487 U.S. —, 101 L.Ed.2d 669 (1988).

Three different aspects of North Carolina's Charitable Solicitations Act unconstitutionally infringe freedom of speech. These aspects are: limitations on reasonable fees that professional fundraisers may charge; a requirement that professional fundraisers disclose to potential donors the percentage of donated funds previously used for charity; and a requirement that professional fundraisers be licensed.

Justices concurring: Brennan, White, Marshall, Blackmun, Scalia, and Kennedy.

Justice concurring in part and dissenting in part: Stevens.

Justices dissenting: Chief Justice Rehnquist, and O'Connor.

ORDINANCES HELD UNCONSTITUTIONAL

110. *Giacobbe* v. *Andrews*, 459 U.S. 801 (1982).

Federal district court decision holding that New York City's plan for apportioning 10 at-large seats for the City Council among the City's five boroughs violates the one person, one vote requirements of the Equal Protection Clause, summarily affirmed by the U.S. Court of Appeals for the Second Circuit, is summarily affirmed.

111. *City of Akron* v. *Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

Ordinance regulating the circumstances of abortions is unconstitutional in the following respects: by requiring all abortions performed after the first trimester to be performed in a hospital, by requiring parental consent or court order for abortions performed on minors under age 15, by requiring the attending physician to provide detailed information on which "informed consent" may be premised, by requiring a 24-hour waiting period, and by requiring disposal of fetal remains in a "humane and sanitary manner."

Justices concurring: Powell, Brennan, Marshall, Blackmun, Stevens, and Chief Justice Burger.

Justices dissenting: O'Connor, White, Rehnquist.

112. *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432 (1985).

City zoning requirement that special use permit is required for operation of a home for the mentally retarded in an area where boarding homes, nursing and convalescent homes, and fraternity or sorority houses are permitted without such special use permits is a denial of equal protection as applied, the record containing no rational basis for the distinction.

Justices concurring: White, Powell, Rehnquist, Stevens, O'Connor, and Chief Justice Burger.

Justices concurring specially: Marshall, Brennan, and Blackmun.

113. *Hudnut* v. *American Booksellers Ass'n*, 475 U.S. 1001 (1986).

Appeals court decision holding invalid under the First Amendment an ordinance prohibiting as pornography "graphic sexually explicit subordination of women" without regard to appeal to prurient interests or offensiveness to community standards is summarily affirmed.

114. *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

County ordinance regulating the operation of bingo and various card games is preempted as applied to Indian tribes conducting on-reservation games.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, and Chief Justice Rehnquist.

Justices dissenting: Stevens, O'Connor, and Scalia.

115. *City of Houston* v. *Hill*, 482 U.S. —, 96 L.Ed.2d 398 (1987).

Ordinance making it unlawful to "oppose, molest, abuse, or interrupt" police officer in performance of duty is facially overbroad in violation of the First Amendment.

116. *Board of Airport Comm'rs* v. *Jews for Jesus*, 482 U.S. —, 96 L.Ed.2d 500 (1987).

Los Angeles Board of Airport Commissioners resolution banning all "First Amendment activities" at airport is facially overbroad in violation of the First Amendment.

117. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988).

City ordinance vesting in the mayor unbridled discretion to grant or deny a permit for location of newsracks on public property violates the First Amendment.

SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISION

Overruling Case	*Overruled Case(s)*
176. *Illinois* v. *Gates*, 462 U.S. 213 (1983).	*Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969).
177. *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89 (1984).	*Rolston* v. *Missouri Fund Comm'rs*, 120 U.S. 390 (1887) (in part); *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909) (in part). *Atchison, T. & S.F. Ry. Co.* v. *O'Connor*, 223 U.S. 280 (1912) (in part). *Greene* v. *Louisville & Interurban R.R. Co.*, 244 U.S. 499 (1917) (in part); *Johnson* v. *Lankford*, 245 U.S. 541 (1918) (in part); Numerous other cases fall more or less under the Pennhurst doctrine. See 465 U.S., 109–111 nn.17–21, 117–121 (maj. op.), and id., 130–37, 159–163, 165–166 nn.50 & 52 (dissent) (listing 28 cases).
178. *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354 (1984).	*Coffey* v. *United States*, 116 U.S. 436 (1886).
179. *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984).	*Hooven & Allison Co.* v. *Evatt*, *324 U.S. 652 (1945).*
180. *Cooperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984).	*United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947); *Kiefer-Stewart Co.* v. *Jos. E. Seagram & Sons*, 340 U.S. 211 (1951).
181. *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).	*National League of Cities* v. *Usery*, 426 U.S. 833 (1976).
182. *United States* v. *Miller*, 471 U.S. 130 (1985).	*Ex parte Bain*, 121 U.S. 1 (1887) (in part).
183. *Daniels* v. *Williams*, 474 U.S. 327 (1986).	*Parratt* v. *Taylor*, 451 U.S. 527 (1981) (in part).
184. *United States* v. *Lane*, 474 U.S. 438 (1986).	*McElroy* v. *United States*, 164 U.S. 76 (1896).
185. *Batson* v. *Kentucky*, 476 U.S. 79 (1986).	*Swain* v. *Alabama*, 380 U.S. 202 (1965) (in part).
186. *Puerto Rico* v. *Branstad*, 483 U.S. —, 97 L.Ed.2d 187 (1987).	*Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861).
187. *Solorio* v. *United States*, 483 U.S. —, 97 L.Ed.2d 364 (1987).	*O'Callahan* v. *Parker*, 395 U.S. 258 (1969).
188. *Welch* v. *Texas Dep't of Highways and Transp.*, 483 U.S. —, 97 L.Ed.2d 389 (1987).	*Parden* v. *Terminal Ry.*, 377 U.S. 84 (1964) (in part).

Overruling Case	*Overruled Case(s)*
189. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. —, 108 S. Ct. 1133, 99 L.Ed.2d 296 (1988).	*Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379 (1935); *Ettelson* v. *Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942).
190. *South Carolina* v. *Baker*, 485 U.S. —, 99 L.Ed.2d 592 (1988).	*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

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